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BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα ᾖ τό τ' ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE RT. HON. W. P. SCHREINER, K.C.

[*Contributed by* PROFESSOR R. W. LEE, *D.C.L., Dean of the Law Faculty, McGill University.*]

THE RT. HON. WILLIAM PHILIP SCHREINER, late High Commissioner for the Union of South Africa, who died at Llandrindod Wells on June 28th, was born in 1857 in the district of Herschel, Cape Colony, in what was then the Wittebergen Native Reserve. His father, the Rev. G. Schreiner, was an energetic and respected agent of the London Missionary Society, who had married an English lady of the name of Lyndall. There were several children, of whom Mr. Senator Theo Schreiner and Mrs. Cronwright Schreiner (Miss Olive Schreiner) are now the only survivors. Another sister, the late Mrs. Stakesby Lewis, was well known for her philanthropic activities, particularly among the native and coloured population of South Africa.

After attending various schools in the colony, Mr. Schreiner entered the South African College, and was in the first list of B.A.'s of the Cape of Good Hope University in the year 1877 He won scholarships which took him to Downing College, Cambridge, where he matriculated in the Michaelmas Term, 1878. His academic career in England was exceptionally brilliant. It included, at Cambridge, the first place in the Law Tripos of 1881, and the Chancellor's Legal Medal. In the following year he graduated B.A. and LL.B., and shortly afterwards was elected Fellow of Downing. In the University of London he graduated LL.B. in 1880, and while a student of the Inner Temple won a 100-guinea studentship in Common Law, and the Senior Studentship in Roman Law and Jurisprudence. Called to the Bar in 1882, he returned to the Cape, where he was admitted an advocate of the Supreme Court, and at once obtained practice. Two years later he married Miss Reitz, sister of the former President of the Orange Free State.

During the next few years Mr. Schreiner became successively Parliamentary Draftsman for Cape Colony, and Legal Adviser to the High Commissioner. In the latter capacity he drafted the Swaziland Convention, negotiated in 1890 between Sir Henry Loch and President Kruger. His services were rewarded with the C.M.G.

In 1893 he commenced his Parliamentary career as Member for Kimberley, and was at once appointed Attorney-General in Mr. Rhodes's second Ministry. He resigned office in the same year, but again joined the Ministry in the same capacity, sitting now as Member for Barkly West. It was on his advice as Attorney-General that the Ministry took the position that the closing of the drifts against colonial traffic by Kruger was contrary to the terms of the Convention of London.

When Rhodes resigned in January 1896, in consequence of the Jamieson Raid, Schreiner declined office under Sir Gordon Sprigg, and two years later carried a vote of no confidence which led to the downfall of the Sprigg Ministry; and in October 1898 he took office as Prime Minister, having for his principal colleagues, Merriman, Sauer, Richard Solomon, Herholdt, and Te Water.

During the fatal months which preceded the South African War, Schreiner entertained the hope that the catastrophe might be averted, and was largely instrumental in procuring President Steyn to arrange the Bloemfontein Conference between Sir Alfred Milner and President Kruger. For some time he fostered the vain idea of keeping Cape Colony out of the conflict. Of his policy at this crisis it is enough to say that it was actuated by high ideals. In 1900 the Schreiner Ministry fell to pieces, principally owing to difference of opinion as to the treatment of the Cape rebels.

After resigning office, Schreiner devoted his attention to his practice at the Bar, only returning to politics in 1907, when he re-entered Parliament as an independent member for the constituency of Queenstown. On the realisation of Union in 1910 he was nominated a Senator in terms of the Act of Union, "on the ground of thorough acquaintance with the reasonable wants and wishes of the coloured races." It was solicitude for native interests which had led him to advocate a federal rather than a unitary constitution for South Africa, and he had resigned from the Cape delegacy to the national convention in order to undertake the defence of Dinizulu, charged with high treason.

Shortly before the outbreak of the Great War, Schreiner accepted the office of Agent-General in London for the Union of South Africa. During the war he devoted himself to the duties of his office, and to the interests of South Africa and South Africans, with an energy which was entirely oblivious of self, thus taxing his constitution to its utmost limit, and undoubtedly hastening the end of a life devoted to the public service, and animated by the highest standard of duty.

In his private relations Mr. Schreiner endeared himself to hosts of friends. In early days he had excelled in many branches of sport, and continued through life to take an interest in every form of manly activity. As an advocate he was for many years the acknowledged leader of the Cape Bar; and this sphere more than politics afforded full scope to qualities which existed in unusual combination—subtlety of mind, simplicity of character, and honesty of purpose.

Mr. Schreiner was made a Privy Councillor in 1917.

THE POLICE POWER IN AMERICAN CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR THOMAS REED POWELL, *Columbia University.*]

ANY discussion of the police power in America is likely to confuse two problems: (1) What shall we classify as police power among undoubted governmental functions? (2) What statutes concededly of a police nature are "valid" or "proper" exercises of the police power, and what offend against constitutional limitations in favour of personal liberty and private property?

The first question is largely academic, and need not long detain us. The only safe answer is that the "police power" is the name given to the functions of government not otherwise named. Learned American writers have called it "a fiction," "the dark continent of our jurisprudence," "the convenient repository for which our juristic classification can find no other place," "the indefinite supremacy of the state," "the power to govern." Such remarks are helpful to readers already familiar with the toil and turmoil, which controversies over the police power have engendered. They may solace those, who have sought in vain to evolve some definition more precise. But they do not chart the way for explorers, to whom the police power is still an unknown land.

The Scope of the Police Power.—If to know that we do not know is the beginning of wisdom, to know that we cannot define is at least a safeguard against folly. Even the best attempts to imprison the police power in a phrase are but starting points for discussion and debate. More useful than the characterisations already quoted are descriptions in terms of purpose. Yet a statement of proper ends leaves unsettled the problem of legitimate means. American Courts are agreed that the police power authorises legislation for the protection of health, safety, and morals; but they differ greatly in deciding what measures are appropriate to the

attainment of these worthy aims. Here as elsewhere the hub of controversy is found in the specific rather than the general.

The ablest and most enlightened jurist in America has declared officially that "the police power extends to all the great public needs," that "it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare." But this expansive statement evokes from the less venturesome Mr. Wickersham the undeniable truth that "if the scope attributed to the police power by Mr. Justice Holmes is to prevail . . . it is hard to see what restrictions upon legislative effort to promote the social welfare still remain, short of the crude appropriation of individual property for private, as distinguished from public, purposes." Without doubt the learned Justice extends the limits of police power far beyond the point at which most of his brethren of the robe would call a halt. The majority of American lawyers would agree with Mr. Wickersham's views of the proper bounds of police power rather than with the more liberal attitude of Mr. Justice Holmes. Many would think the former Attorney-General guilty of dangerous moderation in confining his criticism of the Supreme Court to the mild lament that it "had yielded somewhat unduly to public criticism in giving effect to legislation which, however desirable from the standpoint of social welfare, yet involves a measurable encroachment upon some of those individual rights to secure which the Fourteenth Amendment was adopted."

I.

Liberty of the Subject.—These differences of attitude involve disagreement, not on the propriety of any classification of the various powers of government, but on the application of constitutional limitations to legislative exertions that are admittedly of a police character. The clash is between opposing convictions on the extent to which private interests are immune from legislative interference. An undefined degree of immunity is conferred by the provisions in American constitutions which declare that no person shall be deprived of life, liberty, or property without due process of law. This clause in the Fifth Amendment to the Federal Constitution sets bounds to the activities of the national Congress.

A similar clause in the Fourteenth Amendment limits the action of state authorities, which are also held in leash by due-process clauses in state constitutions. Under the development of the American constitutional system, these due-process clauses are interpreted and applied by the Courts. Any state law duly resisted on the ground that it imposes a deprivation of liberty or property without due process of law must be approved by both the state and the national judiciary before it can be enforced. The laws of Congress must pass a similar test before the Supreme Court of the nation.

The Limitations of Due Process.—In this constitutional setting the practical problem of the police power arises and demands an answer to our second question. In a realm where legislative sovereignty prevails there is no need to give names to the powers of government. The British Old Age Pensions Act may be the Old Age Pensions Act, and nothing more. It is the law of the land because Parliament so decrees. The Courts have only to interpret and apply it. But in America such bestowal of public bounty may be declared null and void by judges who think it wanting in due process of law. The judicial condemnation that may be visited upon novel exertions of fiscal power is much more readily and frequently bestowed upon laws that restrict the freedom of the individual in other ways. Those restrictive laws that are sustained are said to be within the police power and therefore not devoid of due process. Those which fail of judicial sanction are branded as mere arbitrary interferences with the individual, which lack the character of law because they offend against the constitutional requirement of due process. It is a fruitful field for speculation whether statutes fail to be exercises of the police power because they are wanting in due process, or whether they lack due process because they are not exercises of the police power.

The Character of the Due Process.—Even with this enigma unsolved, we may say that " police power," as the term is used in constitutional law rather than in political science, does not signify all governmental enterprise of a police character, but only such exertions as are within the circle circumscribed by the limitations of due process. Only by knowing the authoritative interpretation and application of the phrase " due process of law " can we know the limits of the police power. This quest leads us beyond the

written constitutions to the numerous decisions and opinions of the Courts. The law of the police power, considered in its totality, is essentially judge-made law. This is because the constitutional test of due process, when applied as a criterion of the validity of legislative objects, is in reality no test at all. The connotation of the time-honoured phrase in England casts not even a shadow across the sea, for no English judge has ever successfully ventured to doubt that a legislative enactment was due process of law. Indeed, due process in England has a meaning closely akin to conformity with the statutes of the realm. The novelty of the American constitutional expedient forced the Supreme Court to recognise that the character of the due process prescribed by the Constitution is conditional on environment rather than on heredity. Nor has the Court invented any definite test to fill the void left by the absence of historical background. It has justified this judicial self-restraint by observing:

> But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded (per *Miller J. Davidson* v. *New Orleans*, (1878) 96 U.S. 97).

If this process of inclusion and exclusion is the way of wisdom, it plainly sets the style for an essay on the subject. Not by definition can we portray the police power in America, but only by enumeration and by analysis of the process through which the enumeration is evolved. Of necessity the enumeration to be given here must be fragmentary and incomplete. And any venture at analysis of the process carries us at once into a realm where one man's meat is another man's poison. At best we can only hope to mark the outlines of the controversy.

II.

Federal Police Powers.—Most of the cases in which purported exercises of the police power are questioned involve statutes of the states rather than of the United States. Congress has only those powers granted it by the Federal Constitution, all other powers

being expressly reserved to the states. State legislatures, on the other hand, are regarded as heirs of Parliament, and thereby endowed with all legislative powers not denied to them either by the state or the federal constitution. Thus it is that the police power is loosely referred to as " the indefinite supremacy of the state." It is the power to restrain the use of property and of personal liberty up to the point where the restraint runs afoul of the conception of due process of law. In the stricter legalistic theory there is no federal or national police power. The Congress of the United States has no legislative pedigree. It is *filius nullius*, except as it is a synthetic product created by the Constitution. Its paper parent did not formally endow it with police power. But, since Congress may exert its recognised powers " for police purposes," the term " federal police power " is slowly gaining currency even in judicial opinions. The expression is to be understood, however, as referring to the legitimate police objects for which the national legislature may use its recognised control over foreign and interstate commerce, money, war, the postal system, etc., and its blanket authority to pass all laws which shall be " necessary and proper " for carrying into effect its specifically enumerated powers.

Police Measures in War-time.—Undoubtedly there will soon come before the Supreme Court many important disputes over the police measures taken by the national government in the prosecution of the war. The war power will assuredly be held to justify much more grievous restrictions on private property and personal liberty than would be permitted in the exercise of other national powers. But it is not unlikely that somewhere the Supreme Court will draw a line, which some statutes and administrative orders will be found to have overstepped. Precedent for such action appears in a decision rendered shortly after the close of the Civil War, holding that the powers to wage war and to borrow money do not bear in their train authority to prescribe that the fiat money run off by the government printing press shall be legal tender for payment of debts. As a flying buttress for the decision, the interference with existing contracts was said to be a denial of due process of law. The due-process question and the issue whether a statute is a " necessary and proper " means of waging war are interrelated and interdependent. The degree of remoteness from the actual conduct of hostilities which will exclude legislation from the war power is

more or less influenced by the extent of the burden which the legislation inflicts on property or person.

Free Contract.—Aside from the case referred to—which was overruled the following year, after a change in the personnel of the Court—the due-process clause of the Fifth Amendment has been the announced basis of but one decision annulling an Act of Congress. In *Adair* v. *United States*,[1] by a vote of seven to two the Supreme Court declared it an unconstitutional deprivation of liberty to forbid an interstate carrier to discharge an employee because of membership in a labour union. The minority were of opinion that the interference with " free contract " was justified by the inequality of bargaining power between the individual employee and his employer, with the resulting public interest in promoting actual equality as a means of preventing disastrous strikes. But the majority thought it " not within the functions of government . . . to compel any person . . . against his will to accept or retain the personal services of another." " In all such particulars," declared Mr. Justice Harlan, " the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." The dispute was essentially one over the respective merits of individualism and collectivism as applied to the particular subject matter. The legislature for some reason favoured one policy; the Court, for other reasons, preferred another.

Wages Legislation.—With the *Adair* case may be contrasted *Wilson* v. *New*,[2] which by a vote of five to four sustained a law of Congress that in effect required interstate carriers to raise the wages of their employees for a prescribed term. The law had been passed in the imminence of a strike which threatened to cripple the commerce of the country. The Court narrowed its decision to the declaration that the public interest in uninterrupted transportation justified the legislative imposition of a wage agreement in a crisis, when the contending parties were unable to reach an agreement through negotiation. The Chief Justice carefully refrained from any utterance that would sanction any general power to prescribe wage standards.

Interstate Commerce.—Among other Acts of Congress which have passed muster are laws forbidding the interstate transit of

[1] 208 U.S. 161 (1908). [2] 243 U.S. 332 (1917).

lottery tickets, intoxicating liquors, impure foods, and men and women on errands of vice. Barriers to the importation of low-grade teas, of deep-sea sponges taken by divers, and of motion-picture films of prize fights, have been approved on the declared principle that over foreign commerce the power of Congress is complete. This means that importation from abroad is a matter of privilege, so that no restriction thereon can be a denial of due process. There seems to be, however, a constitutionally guaranteed liberty to engage in commerce between the states, so that restrictions on this liberty must have adequate justification. This rests on *dictum* rather than on decision, for thus far no prohibition of interstate commerce has been found wanting in due process. The invalidity of the federal law excluding from interstate commerce the products of child labour was predicated on the assertion that it was not a regulation of transportation, but an effort to usurp the reserved powers of the states over the processes of manufacture.

Fiscal Powers.—A word should be said of the use of the national fiscal power for police purposes. It may not have escaped the attention of foreign observers that the American tariff on imports is not framed exclusively with a view to revenue. So internal excises have been laid with no thought of enriching the public treasury. A tax on the manufacture of oleomargarine, which was designed to be prohibitive or nearly so, was upheld by the Supreme Court, with the declaration that it was not for the judiciary to inquire whether the purpose or motive of the law was something other than a fiscal one. Congress has recently passed a law laying a prohibitive tax on manufacturing in which children under designated ages are engaged. The Supreme Court cannot without reversing itself hold that such a law is an invalid attempt by Congress to do indirectly what it lacks power to do directly. But the decisions do not foreclose the contention that the due-process clause is a shield against the use of the internal-revenue power for purposes of prohibition. It is to be anticipated that, if Congress sought to tax out of existence an enterprise which the Supreme Court thought worthy and innocent, the due-process clause would be found a barrier to what would be called an unwarranted invasion of the right of the individual to pursue lawful callings.

III.

The powers of the states are wielded over such a range of subjects that the police-power questions which state laws bring to the Courts are legion. Between the first decision on the Fourteenth Amendment in 1872 and the close of the term of court ending in June 1911, the Supreme Court had considered 604 complaints against state action and had extended a helping hand to 55 of the sufferers. In 312 of these cases the complainant was a corporation, as in 39 of the cases in which relief was granted. This record includes objections to the powers of taxation and of eminent domain as well as to police measures. During the last lustrum (1914-1919) the Supreme Court considered 97 objections to police measures, of which 12 were sustained. Forty-one of the complainants were public-service corporations, as were eight of the twelve who succeeded. The great majority of current decisions depend on their special facts and involve no novel points of doctrine. The issue is substantially one of fair dealing and of the presence or absence of adequate justification in public interest or necessity for the coercion imposed.

Rights over Property.—Most legislative interferences with the use of property have met with judicial approval. This is doubtless due to the fact that a large proportion of them have a fairly direct relation to the protection of health or safety. Brick kilns, livery stables, and smoking chimneys may be outlawed in populous districts, in spite of severe economic loss to their owners. But a sudden and whimsical changing of the limits within which gas works may be operated has been denounced and set aside. It was on the professed reason of an unconstitutional interference with the right to dispose of real estate that a recent effort at residential race segregation met with reverse, although the underlying consideration was doubtless the denial of personal liberty to dwell where fancy dictates and economic means permit. When the legislature frankly seeks to use the police power for the attainment of æsthetic objects, it meets with rebuff. It cannot ensure attractive streets by prohibiting ugly billboards or requiring landowners to conform to building lines desired by a majority of their neighbours. It cannot restrict the height of buildings to make the city beautiful, although restrictions really imposed from motives of taste not infrequently secure approval as precautions against danger and

disease. It is still to be determined whether cities may pass zoning laws, prescribing the areas in which innocuous manufacture and retail trade may be carried on, with a view to stabilising real-estate values and preventing the economic waste occasioned by the recurrent migration of various enterprises from one locality to another. It will not be surprising if such legislation is condemned as an attempt to restrict the profitable use of one man's land for the benefit of his neighbours. Not infrequently what cannot be accomplished under the police power may be secured by eminent domain, with adequate compensation to persons affected adversely.

Public Utility Services.—The figures already given indicate that nearly half of the complaints against police regulations are advanced by corporations conducting railroads and other public utilities. Legislative or administrative regulation of rates must not depress them below the point at which they fail to yield a "fair return on the fair value" of the property devoted to the business, though the Courts are far from certain what they mean by "fair value," and seem to decide each case on its own merits. Roughly speaking, public utilities are protected in normal enhancements of value other than that due to their monopoly position. Tramways often complain of ordinances requiring them to pave a portion of the highway or to bear the whole or a part of the cost of constructing bridges or viaducts, but seldom with success. An ambitious state not long ago conceived it desirable that the upper berths of sleeping cars should not be lowered when unsold; but the Supreme Court thought it guilty of a benevolent but unconstitutional effort to give the purchaser of the lower berth the luxury of more air space than he had paid for. Occasionally railroads escape from requirements to make switching arrangements or to furnish other facilities that the Court regards as not warranted by the public need. The only principle on which such cases are decided is the principle of reasonableness, and the judicial opinions are devoted largely to weighing and balancing the competing considerations of public advantage and private detriment in each particular instance.

Parasitic Businesses.—The efforts of the states to rid themselves of businesses that they think parasitic have met with varying success. The Supreme Court has lately sanctioned prohibitive taxation of the trading-stamp enterprise, remarking that "of course this is an exercise of the police power." On the other hand,

a law forbidding employment agencies to charge or accept fees from persons seeking employment was held unconstitutional by a vote of five to four. All the members of the Court recognised the existence of pernicious practices among employment agencies, but the majority refused to believe that a major operation was necessary. The potential evils in moving pictures and in the sale of so-called investment securities have been found sufficient to justify administrative censorship designed to guard against immorality and against misplaced confidence in what may prove to be mere scraps of paper. Banks may be compelled to contribute to a state fund for the security of depositors, thus helping to guarantee the solvency of their competitors. And legislation designed to promote the freedom of competition and to prevent restraint of trade is seldom found obnoxious to the liberty guaranteed by the Constitution. It is interesting to observe that most legislation of this character is couched in such general terms that the definition of competition and of restraint of trade is largely left to the Courts.

Liberty of Contract.—The fiercest battles have been fought over the principle of liberty of contract. Laws limiting hours of labour, forbidding payment of wages in scrip not redeemable in money, regulating company stores, prescribing the measure for computing the sum due for piece work, prohibiting docking for defective work, requiring periodic payment of wages, and similar efforts to alter existing labour conditions have met with varying success in the Courts of the states and of the United States. Some of the judicial utterances condemning legislation in this field compare with utterances really "judicial" in much the same way as Mr. Dicey's Introduction to the second edition of his admirable analysis of *The Relation Between Law and Public Opinion in England* compares with the objective and dispassionate tone of the main body of the work. For these utterances and for a treatment of the problem executed with unrivalled power and insight, readers should go to Dean Pound's article on "Liberty of Contract" in the *Yale Law Journal* for May 1909. In this he tells us that "legislation designed to give labourers some measure of practical independence and which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by Courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of

statutory labourers, and to stamp them as imbeciles." Elsewhere the learned author points out the underlying cause for decisions which, he says, " it has been the fashion to refer of late to class bias of judges or to purely economic influences." He finds the explanation in philosophy rather than in economics. In the *Harvard Law Review* for May 1914 he says:

> Perhaps nothing has contributed so much to create and foster hostility to Courts and law and constitutions as this conception of the Courts as guardians of individual natural rights against the state and against society, of the law as a final and absolute body of doctrine declaring these individual natural rights, and of constitutions as declaratory of common-law principles, which are also natural-law principles, anterior to the state and of superior validity to enactments by the authority of the state, having for their purpose to guarantee and maintain the natural rights of individuals against the government and all its agencies.

IV.

The Attitude towards Labour.—This cursory review of the " gradual process of judicial inclusion and exclusion " shows that American Courts have been more tolerant towards restrictions on commercial activities and business practices than towards efforts to eradicate some of the elements in existing methods of industrial management. The labourer has been exalted as an efficient guardian of his own interests in so far as they touch the general welfare, while merchants and bank-depositors and investors have been subjected to tutelage. In matters with which their career at the bar has made them familiar, judges show more respect for legislative regulations than in fields more remote from their personal experience. Courts trust doctrine more implicitly where they do not know the facts than where they do. Individual liberty to be overworked and scantily paid is deemed more sacred than individual liberty to exercise a defective judgment as to the solvency of a bank or the value of stocks and bonds and trading stamps.

On the whole the Supreme Court of the United States has been more tolerant towards modern legislation than have many of the state Courts. It shows a marked disinclination to reject a state statute which a state Court has accepted, though this disinclination

is occasionally overcome. Slowly all Courts find palatable laws which a decade ago were abhorrent. In 1905 the Supreme Court by a vote of five to four annulled a law prescribing a maximum work-day of ten hours in bake-shops. Twelve years later a ten-hour law for all manufacturing establishments was approved by a vote of six to three, without mention of the contrary precedent of the *Bake Shop Case*. Yet two years ago the Supreme Court was evenly divided on the constitutionality of the statutory minimum wage for women, one of the justices being disqualified by reason of having been of counsel.

Judicial Recall.—The *Bake Shop Case* and the annulment of a workmen's compensation law by the New York Court of Appeals furnished munition for Mr. Roosevelt's demand in 1912 for the "recall of judicial decisions"—a device for taking direct appeals from the judiciary to the electorate on decisions annulling police measures. Such appeal is always possible by the more cumbrous method of constitutional amendment, and is not infrequently invoked. New York amended its constitution so as to authorise the legislature to substitute a compensation system for industrial accidents in place of the common-law rules of negligence, as a necessary basis of liability. The recall of judicial decisions was to be a change in the method of constitutional amendment. As a campaign slogan it aroused wide popular interest and provoked much discussion of the nature and results of the American system of judicial control over legislation. The proposal shocked the conservative traditions of the American bar, but it is thought by many to have induced the Courts to relax somewhat their censorship over novel police measures.

The Function of the Judiciary.—The political debate inaugurated by Mr. Roosevelt's proposal brought out two opposing views of the nature of the function exercised by the judiciary in declaring statutes unconstitutional. The advocates of the device held that in annulling a police measure under the form of ascertaining the meaning of the words "due process of law," a Court wields a veto power and substitutes its views of public policy for those entertained by the legislature. Against them it was urged that this peculiarly American judicial function is a necessary instrument of true popular government. The judges, it was said, do but declare the will of the people as solemnly embodied in the fundamental law, and prevent the frustration of this supreme will by temporary aberrant legislative

majorities. This view finds in laws restricting individual liberty for the assumed promotion of public good some inherent vice or inherent virtue which Courts as experts discover in some wholly impartial and objective fashion. Against this analysis may be set an observation by Judge Charles M. Hough in the *Harvard Law Review* for January 1919: "No man has seen more plainly that the Court was measuring the legislature's reasons by its own intellectual yardstick than has Justice Holmes; none more keenly perceived that the notations thereon marked those results of environment and education which many men seem to regard as the will of God or the decrees of fate."

Judicial Legislation.—Such divergence of view is not confined to questions of the police power. It is not peculiar to American jurists or to jurists as a class. Theologians and philosophers have indulged in similar debates for centuries. Indeed, it is from a theologian that those who dissent from what must be regarded as the polite view in America draw one of the most striking statements of their argument. As long ago as March 31, 1717, Bishop Hoadley said: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them." Of course this statement, like most of similar character, is only measurably true. Mr. Justice Holmes puts the point more cautiously when he says: "I recognise that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Though the law of the police power is judge-made law, it is made with reference to some standard to which the temporary wielders of judicial power acknowledge fealty. The personal predilections of judges are controlled to a greater or less degree by the predilections of their predecessors and by the run of thought in the community whose magistrates they are.

A suggested Test of Police Power.—It must be confessed that the standard of proper police power is somewhat elusive. The reference to "fundamental principles," in which Courts so often indulge, is little more than a gesture at the sky. A unique attempt to bring these fundamental principles to earth has been made by Mr. Albert M. Kales in the *Yale Law Journal* for May 1917, in an analysis which tallies fairly well with the decisions. The situation requiring control is called the struggle between the labour units and the managing units of the population. The "legislative power," says Mr. Kales, "is

the legitimate means of correcting mistakes of persistent stupidity and shortsighted selfishness on the part of the managers" and "of compelling all to do that which the wiser are ready to do, but the more stupid and the more selfish are unwilling to attempt, and, therefore, not infrequently prevent action by any." It is also "the legitimate means of cutting down the rewards of successful management so that they are not out of all proportion to what the successful manager is willing to take."

So far as the legislation in question tends to accomplish these objects, it should be sustained. On the other hand, so far as it tends to substitute a legislative fiat for the judgment of the managers, and thereby places the management of our industrial and commercial units in the hands of the legislature—so far as it tends to undermine the manager's chances and motives for successful management, or to impair the competitive system by which the managers are selected, or to interfere with the ownership and distribution of private property by which the manager's authority is maintained—the legislation in question is a menace to the social structure, and, therefore, inimical to the general welfare, and should be condemned. What the Court obviously has to do is to balance these opposing tendencies of any given legislation and to determine its predominant effect. If its predominant effect is that of correcting the mistakes of persistent stupidity and shortsighted selfishness on the part of the managers, it should be valid. If its predominant effect is that of reversing some fundamental principle upon which the social order rests, it should be void.

Attitude of Individual Judges.—Mr. Kales has made a commendable effort at an objective analysis of the subjective. He seeks to articulate the inarticulate major premise which Mr. Justice Holmes implies when he says: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." In so far as the hypothesis of a continuing collective judicial mind is helpful, Mr. Kales has made a notable contribution to our understanding of the police power. But we cannot overlook the difficulty that the inarticulate subtleties are in the individual minds of individual judges. The composition of the bench before which a question of police power is to come is a significant factor in any wise attempt to forecast the decision. The nine judges now constituting the Supreme Court of the United States fall easily into three equal groups. Three give police legislation the

benefit of any doubt. Three hold the legislatures to rather strict account. The remaining three determine the decision of all close cases. When many important cases are decided by a vote of five to four, it is impossible to neglect the part played by the social and economic outlook and the philosophical prepossessions of individual judges in determining the course of the law of the police power. Mr. Kales, in a later paper published in the *American Political Science Review* for May 1918, expresses the point by saying:

> In addressing the Court in due-process cases one should not commence with the usual salutation "May it please the Court." Instead, one should say "My Lords." Backed by and charged with the enforcement of the due-process clause of the Fifth and Fourteenth Amendments, the Supreme Court of the United States is the American substitute for the British House of Lords. It constitutes the real and only conservative second chamber of the federal government. It is a second conservative chamber for each of the state governments.

To this it should be added that an amendment to the Federal Constitution is probably somewhat more difficult to secure than is the enactment into law by the Commons of a bill rejected by the Lords.

ON MANDATORY GOVERNMENT IN THE LAW OF NATIONS.

[*Contributed by* PROFESSOR GOUDY, D.C.L.]

THE Covenant for a League of Nations presented by the Special Commission of the Entente and Associated Powers to the general body of international representatives at the Peace Congress at Paris, and now forming part of the treaty of peace with Germany, is a document of vast importance. First published on February 14 of this year, and afterwards slightly amended, it may be regarded as a valentine of hope and peace sent to the whole world. How far it will be effectual and produce beneficent results will depend on goodwill among men, and meantime is on the knees of the gods.

While all the clauses of the Covenant require the careful consideration of jurists and publicists, the present note is confined to Art. 22, which places certain conquered colonies and territories, whose autonomy is of a precarious type or whose civilisation is backward, under so-called "Mandatory Government"—that is, apparently, government constituted by mandates from the combined Powers forming the League of Nations. This provision is certainly of a novel character, and offers not a little food for reflection. Such colonies and territories are to be deprived of their former rulers to have, at least in some cases, no choice of their future rulers or other rights of self-disposal, and to remain in the tutelage of a foreign Power. They are not to be neutralised or otherwise internationalised, but are to hold an anomalous position.

The following are the terms of Art. 22:

Article 22.—To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the

modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation, and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised, subject to the rendering of administrative advice and assistance by a Mandatory, until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory, under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals ; the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic ; and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes, and the defence of territory ; and will also secure equal opportunities for the trade and commerce of other members of the League.

There are territories such as South-west Africa and certain of the South Pacific Islands which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the Territory of the Mandatory and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

It will be noticed that the terms "trust" and "tutelage" are both used in the above Article, but without any technical significance.

What is meant by this "mandatory government?" How far does it conform to the ordinary principles of mandate in private law? These questions require examination. As the term *mandate* and its conception in modern jurisprudence are derived from the Roman law, and as the draftsmen of the Convention probably had the principles of that system in view, it may be best to examine briefly the position with reference to it.

The Nature of Mandate.—Every student of Roman law is aware that mandate (*mandatum*) was a contract of good faith, based primarily on friendship, between two parties, by which one of them undertook to perform some lawful act or business for the other gratuitously in accordance with the latter's order or request. As in partnership *fraternitas*, so in mandate *amicitia*, was the basis of the contract; condemnation on account of bad faith was punished in both with *infamia*. The party making the request was called the mandant (*mandans*, *mandator*), and the party undertaking the business, etc., was called the mandatory[1] (*qui mandatum suscepit*, *procurator*; the convenient term *mandatarius* is mediæval). By Justinian, in his Institutes, mandate was classed as a purely consensual contract—along with sale, hiring, and partnership—but this is an illogical and artificial classification. Though constituted by simple consent, mandate was properly a contract *sui generis*—(more akin to the real than to the consensual contracts)—being *inter alia* gratuitous and imperfectly bilateral, and revocable at the will of the mandant, and even renounceable by the mandatory under certain circumstances.

Characteristics of Mandate.—*Inter privatos* there was no limit to the contractual powers which the mandant possessing them might hand over to the mandatory, or to the duties which the latter might undertake. The contract might involve the management of a man's whole affairs (general mandate), or be restricted to some particular transaction (special mandate). It might carry either plenary authority or be limited to any degree. The obligations of the mandatory were to perform the instructions given to him or

[1] *Mandatary* is preferable to *mandatory*, though the latter form is sanctioned by usage.

implied from the nature of the business, and, after execution, to account for his intromissions. And he was bound to show ordinary diligence (*omnis diligentia*) in executing his instructions. On the mandant the contract imposed no obligations directly, but he was bound to keep the mandatory scatheless and relieve him of all liabilities incurred. The mandate might be either indefinite as to its duration or for a fixed period, and might be with or without conditions. It might be revoked, as I said, by the mandant at any time, but subject to liabilities incurred by part-execution, and it might correspondingly be renounced by the mandatory *re adhuc integra* or under circumstances involving no blame on his part. Death of either party or equivalent dissolution of personality, when known to the other, put an end to it, but subject always to liabilities already incurred. The obligations of the mandatory were enforced by *actio mandati*, which was one of the commonest actions of Roman law, while claims of indemnity, if any, by the mandatory were enforced by *actio mandati contraria*.

The Purposes of Mandate.—The purposes of mandate might be infinite, and Roman lawyers distinguished several species in respect of the person to be benefited by it. Though in origin it was, as stated, for the benefit of the mandant alone, its sphere was gradually much expanded. It might also be for the joint benefit of the mandant and mandatory, or of the mandant and a third party, or of the mandatory and a third party, or of a third party alone, though in principle the two last-mentioned only became obligatory through interest of the mandant emerging *ex post facto*. All these several species are mentioned in the title "De Mandato" in Justinian's Institutes. There was still another case, though overlooked by Justinian (as it was by Gaius before him)—Dig. xvii. 1 fr. 2—viz., a mandate in the execution of which the mandant, the mandatory, and a third party, had all an interest.[1] On the other hand, a mandate, in the interest of the mandatory alone, had as a rule no legal effect; it was regarded as no more than counsel or advice. Further, it is to be noted that in all cases of mandate for behoof of a third party (*sui juris*) the assent of the latter, express or implied, had to be given.

Gratuitous Character of Mandate.—Finally, mandate was strictly gratuitous. If any valuable consideration was to be received

[1] See Vinnius, *Ad Inst.* III. 27 pr.

by the agent for his services, it was not proper mandate, but *locatio operis* or *locatio operarum* or else an innominate contract. In early Roman times public and professional services were never remunerated as such ; they were *operæ liberales* and performed *honoris causa* ; but during the Empire this became greatly changed, and remuneration for many of such mandatory services, under the name of *honoraria* (*salaria*), was recoverable by special procedure (*extraordinaria judicia*). It was even competent to bargain for an honorarium beforehand.

Mandate in English Law.—Such in broad outline were the rules of mandate in the Roman law, and they have been adopted, with more or less modification, by most modern systems of law. The term is in universal use on the Continent, and embraces all kinds of agency. In England gratuitous mandate has never, as such, been of much importance, owing to our doctrine of consideration ; it has been treated rather as a real contract, and forms one of the class of bailments restricted to movable property. It has been largely merged in our law of agency, which is a bilateral contract, and for valuable consideration. It has also been somewhat obscured and rendered less important by our doctrine of trust. Trust is, in a sense, a kind of mandate ; it has been described as a combination of mandate and deposit. But between a trustee and a mandatory there are numerous differences (*e.g.* title of property) which need not here be considered.

To apply the principles and rules of mandate above set forth to the clauses of Art. 22 of the Convention is not easy, and will give rise to various problems. The following questions, among others, may have to be considered :

1st. **The Mandant.**—Who is to be the mandant ? Apparently the answer must be—the League of Nations, acting either directly or through its Executive Council. If one asks on what title it assumes internationally this authority, the only answer will be—by right of conquest by the Entente and Associated Powers.

2nd. **The Mandatory.**—Who is to be Mandatory ? It appears that any State selected by the mandant Powers for the purpose may act as such. It is not made a condition that such State should be itself a member of the League of Nations, but probably this may be assumed. However, by c. 4 of Art. 22 it is provided that in certain communities the wishes of the inhabitants must be a principal

consideration in the selection of the Mandatory Power. These are communities formerly belonging to the Turkish Empire (*e.g.* Palestine), whose status as "independent nations" is to be provisionally recognised. Apparently subordinate Governments—*e.g.* self-governing Dominions and colonies, such as South Africa and Australia—may act both as independent members of the League, and as Mandatories. Thus in all probability the Australian Commonwealth will become the administrator of Samoa. There will be an analogy in these instances to the case in Roman law of co-tutors appointing one of their number to administer.

3rd. **The Object of the Mandate.**—What is to be the object or purpose of the mandate? Apparently it is to govern or administer the affairs of each subjected colony, dependency, etc., for their benefit in accordance with the general or special directions of the mandant Powers. Control and good administration, in short, are the primary objects; the intention obviously being to prevent annexations. It is consonant with such mandate, as I have said, that the administration be either with wide or limited powers, and it seems to be intended by the Convention that such powers shall vary in individual cases according to circumstances. In some instances the subjected colonies, etc., are even to obtain *provisionally*, as mentioned above, a status of independence. But difficult questions are here likely to arise. Will the Mandatory be entitled to alienate or hypothecate lands of the tutelary territories? Not, apparently, without express authority (See Dig. 3. 3, s. 63, and French Code Civile, Art. 1988). The terms of para. 3 of our Article are as follows: "The character of the mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other circumstances." And in a subsequent clause it is said: "The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council."

4th. **The Termination of the Mandate.**—How is the mandate to be terminated? If once partially executed, can it be revoked? Undoubtedly, on legal principle, failure by the Mandatory State to carry out its instructions will warrant revocation. But what kind of indemnification, if any, will then have to be given? Dissolution, moreover, of the League of Nations will doubtless put an end to the

mandate, as will a change, say by conquest, in the Mandatory State.

5th. **The Beneficiary of the Mandate.**—In whose interest, or for whose benefit, is the mandate to be constituted? Plainly it is for the benefit, to some extent, of the mandant—the League. Its primary purpose is to insure the peace of nations. But is it also in the interest of the Mandatory? This also must be answered, at least generally, in the affirmative. There may possibly be cases when the Mandatory's action will be one of pure benevolence (*e.g.* if the United States undertakes to administer Armenia or Constantinople), but such cases will be rare. The Mandatory Power will naturally make use of the territory to enhance, consistently with its instructions and conventional obligations, its material interests. But, further, by the express terms of Art. 22, the Mandatory administration is to be in the interest of the colonies and other territories subjected to it. The mandate thus becomes ordinarily one, to use the technical language, *mea, tua, et aliena gratia*. Here the reflection occurs—if the subjected colonies, territories, etc., are not to have rights of self-disposal or self-determination, can their subjection to government against their will be regarded as consistent with mandate? Even if it be for their own behoof? According to legal principle, no one can be forced to accept a benefit against his will. Mandate *aliena gratia* had always to be with the consent, express or implied, of the third party. But here the position is anomalous; only in certain cases are the wishes of the inhabitants of the subjected territories to be consulted.

Liabilities.—Finally, is the mandate of the League to be regarded as strictly gratuitous or as remunerated agency? In either case the Mandatory will be entitled to indemnification for any expense or loss he may have incurred in executing the mandate, and apparently this will be recoverable from the League of Nations, presumably in the International Court of Justice which is to be set up. Whether such claims will be recoverable in proportion to the quota of contribution of each member of the League to a general fund, or otherwise, remains to be seen. By Roman law each Power would, it is thought, be liable *in solidum* (Dig. xvii. 1 fr. 59, s. 3). Nor is it clear what remedy the mandant will have if the Mandatory State neglects its duties under the contract, though probably withdrawal of the mandate would follow.

On the whole, the analogy of international mandates of the kind before us to mandate in private law is a rather vague one, with not a few complexities, and the same rules can hardly be applied to both in practice, except to a partial extent.

In what respects the new ward-territories, so to call them, will differ from protectorates as regards international relations, it is hard to say. Apparently they are to differ from each other so materially in individual instances that no general rule can be laid down.

THE NEW CONSTITUTION OF CHINA.[1]

[*Contributed by* H. B. Morse, Esq., LL.D.]

Of the making of constitutions there is no end, and in the making of republics there is now much activity. At the opening of the century the republics of the world were—with the exception of storm-tossed France, of Switzerland in her mountain bastion, and of Andorra and San Marino protected by their insignificance—confined to that new world of which the very existence was unknown to the old world four centuries ago. Speaking generally the new world had uniformly adopted the new republican system, which is as old as human history ; and the old world adhered to its time-honoured monarchical system. Now what a transformation ! The old world is coming into line with the new. Crowns are falling, thrones are toppling, and Plebs is coming into his own. The despotic monarchies have for the most part disappeared in a cloud of opprobrium. The monarchies which remain in Europe are those democratic states which managed to maintain a status of precarious neutrality through the last five years, and those other democratic states which entered upon their trial by combat to maintain the essential rights of democracy. In Asia there remain the Empire of Japan, and the only partially independent kingdoms of Siam, Persia and the Hedjaz.

The Chinese Dynasties.—The ball was set arolling on the western and eastern shores respectively of Europe and Asia, in Portugal and in China. In China fell an empire to which may be variously ascribed an age of 268 years (accession of the first Manchu Emperor, A.D. 1644) or of 2133 years (assumption of title of the "First Emperor," 221 B.C.), or of 4,549 years (accepted date for the

[1] *China's New Constitution and International Problems.* By Min-ch'ien T. Z. Tyau, LL.D. Shanghai : Commercial Press, 1918. (London : Sweet & Maxwell. New York : G. E. Stechert & Co.)

first cycle of Cathay, 2637 B.C.), or of 4,764 years (reputed date of legendary Emperor Fuhi); and of which the historical records extend over a period of 2700 years. Contemporary with Socrates, Plato, and Aristotle, China had her sages, Laotze, K'ungtze (Confucius), and Mengtze (Mencius); her poets of the Tang (A.D. 618–907) and Sung (A.D. 960–1278) dynasties were as melodious as those of the courts of Charlemagne or of Haroun; her ceramic art of the Ming dynasty (A.D. 1368–1643) was the despair of European imitators; and the Tsing dynasty of the Manchus governed an empire which excited the admiration of the chroniclers of the Dutch embassies of the seventeenth century and of Lord Macartney's embassy (1792). And yet this empire fell unwept and unhonoured.

Other dynasties in the history of China had had their period of vigorous youth, followed by decrepitude, and ending in impotence and disorder. The Golden Age of the Han dynasty (206 B.C.—A.D. 25) was followed by two centuries of confusion. The Tang dynasty was much harassed by Tartar incursions, but literature flourished and the arts advanced. It was followed by a century of the feuds of warring generals. The Sung dynasty governed all China for a century and a half; its rulers were then driven from North China by the "Golden Horde" of Tartars; and, for another century and a half, the empire was divided. The Chinese Emperor of the South then called in the Mongol to eat his brother dog; but his appetite was large and the Mongol dynasty (A.D. 1280–1368) ruled for a century the whole of that China which elicited unbounded praise from Marco Polo the Venetian. Incapable of ruling a highly intellectual people like the Chinese, the Mongols were expelled by their subjects; and their successors, the Ming dynasty, passed through the traditional phases of vigorous youth, indolent and luxurious middle life, and decrepit old age.

This too is the history of the Manchu dynasty, occupying the throne of an empire which was, in the main, administered by its Chinese statesmen. During the first four reigns the Manchus were still virile; their emperors were capable generals and had a mentality strong enough to direct and control the working of the bureaucratic machine which constituted the government of the empire; and their bowmen were unconquered. With the fifth emperor began a century of weakness and corruption; in that century, during six disastrous reigns, there was not one emperor

able or inclined to exercise his power for the good of the empire or the people—save only one who sat, not on the throne, but behind the screen, the Old Buddha, the Empress Dowager Tzehi. For the first half of that century, through two reigns, the empire was afflicted by numerous rebellions like ulcers on the body politic, culminating in the great Taiping rebellion. By this and other contemporaneous risings every province in the empire was overrun at one time or another, many provinces were dominated, and some, the richest and most populous, were wrested from the control of the imperial administration ; and it was after a long and exhausting struggle that the lost provinces were recovered by the genius of three great statesmen of the subject Chinese race, Tseng Kwofan, Li Hungchang and Tso Tsungtang, with the indispensable aid of the disciplined troops under the American Ward and the Scottish Gordon. Towards the end of that first half-century came the first war with England, and in the midst of the Taiping rebellion the war with England and France, both bringing further defeat and humiliation to the empire.

The rebellions were well in hand in 1864, and order was completely restored in the eighteen provinces by 1870. To avert defeat and to suppress rebellion the Manchu rulers had shown no capacity ; and, after the restoration of order, Manchu and Chinese alike fell into the slumber of self-satisfied incompetence. By neither was any serious effort made to reform the administration of the empire, to organise its resources, or to strengthen its defences, through the whole of the years of peace to the war with Japan (1895).

The Introduction of Democratic Thought.—Meantime a ferment of thought had been introduced into the inchoate mass of the Chinese people. The myriads of emigrants to the Southern Isles (Singapore, Java, etc.), and especially to California and Australia, found that, though they might be kicked and have their queues twisted, still, under the democratic government there prevailing, they were free to enjoy the fruits of their labour. But, on their return to their native land, they were systematically robbed of their savings by the extortion and oppression of the officials of their own race ; and the preference for a democratic system of government which was inevitably instilled into them was, in the chilling atmosphere of the musty old empire, as inevitably given a revolutionary bias. The thousands of students who passed through the

government schools at Hongkong and the missionary schools at Shanghai and other cities of China inevitably, albeit perhaps unconsciously, imbibed from their teachers the elementary Western ideas of justice between man and man, of the duty of the governors to the governed, and of national dignity. The selected scores of students who passed through the American universities, supplemented by the few who had attained to the higher education in England, returned to their native land filled with the feeling of Chatham's declaration—" I know I can save the country, and I know no other man can " ; they deplored the position in the world occupied by China, and they scorned the feebleness and incapacity of her old-time officials. Thus was the ferment introduced; but the mass remained apathetic.

The War with Japan.—The result of the war with Japan brought China to humiliation—and set the ferment working; the forcible seizure from the helpless empire of the foreign enclaves, beginning with the occupation of Kiaochow by Germany, brought conviction of the need of reform to many of the more honest-minded in the gentry and the official world ; and, in 1898, China had her Hundred Days of Reform. This movement was an attempt to recast the existing regime and turn it into a constitutional monarchy ; its proposals were excellent in detail ; but it was premature and too drastic, it received its impelling force solely from the mentally anæmic Emperor and his adviser, the inexperienced enthusiast Kang Yuwei, and the reforms were so thorough as to alarm the Manchu court and nobility and the Chinese bureaucracy, and to threaten their privileges and their emoluments. The reaction was carried out with thoroughness, and the leaders in the reform movement were visited with the penalties for rebellion common to all primitive Oriental countries.

The Boxer Rising.—In the blood-guiltiness and madness of the Boxer rising, Manchus and Chinese were alike implicated; but the more far-seeing among the statesmen of the empire (notably the Chinese Li Hungchang, Liu Kunyi, Chang Chihtung and Yuen Shihkai, and the Manchus Junglu and Twanfang) resisted to the utmost the folly of this national uprising. The national feeling was profoundly stirred—not by the rising, but by its suppression ; and the diplomatic settlement, which reduced China to a state of subjection to the foreign powers, left to her, in their common rela-

tions, few of the attributes of a sovereign nation. Even the court was now stirred to a few tentative steps towards reform, but carefully calculated not to disturb the privileges of the Manchus or the emoluments of the bureaucracy.

Russo-Japanese War.—Then came the Russo-Japanese war—a war fought on Chinese soil to determine which of two foreign powers should dominate three provinces of the Chinese empire, while China looked on, helpless and submissive. The victory of the Asiatic power in this war produced an electric effect on the Chinese nation, reacting even on the court and the Manchu nobility and forcing them to see that a change—some change, any change—was necessary and inevitable. Japan had asserted her right to a place among the nations and (the logic was clear) she had done it because of her adoption of a modern constitution and her wholehearted acceptance of Western education and Western methods; and what one small Asiatic power had done, must surely, by the adoption of the same means, be possible for another Asiatic power, far greater in area, in population, and in its resources.

Constitutional Reform.—Then followed for China the period of the making of constitutions. The empire first tried its hand. In the two years from September 1906 to August 1908, a series of imperial decrees was issued promising reform, reconstituting ministries, creating a national assembly, and holding out the hope of a future parliament; but the summoning of the last was deferred for nine years, during which, it was announced, progressive steps were laid down for training the electorate and legislators in their duties; at the same time the draft of the new constitution, to come into effect at the end of the nine years, was issued for general information, the first article declaring that "the Tatsing dynasty shall rule over the Tatsing empire for ever, and shall be honoured through all ages." Within three months occurred the death of the aged Empress Dowager, following by a day the death of the Emperor; and with the removal of the only capable ruler of the state that the imperial family had furnished for over a century, disappeared the last hope of saving the dynasty.

The Manchus had in reality learned nothing. Their nobility was more concerned with preserving its own privileges and emoluments than with reforming the state; the Chinese statesmen supporting the dynasty had a great regard for their emoluments; the nation

was apathetic in supporting the throne ; the reformers alone had clear-cut aims, and had the advantage of assuming the offensive ; and the empire fell. The revolution was declared in October 1911, and was immediately successful through all the provinces south of the Yellow River ; and the infant Emperor abdicated in February 1912. Sun Yatsen, the chosen leader of South China, stepped aside with a praiseworthy degree of self-abnegation ; and the whole of the late empire was united under Yuen Shihkai, the first President of the Republic of China.

The First President.—A new constitution was obviously required. Of this it is enough to say that it seems to have combined the executive president of the American constitution with the executive premier of France, the United Kingdom, and the British Dominions. The arrangement could not have worked ; but the first premier, Tang Shaoyi, promptly decided to efface himself, taking refuge among his friends and supporters in South China.

Yuen Shihkai had not the strength and ability of some among the statesmen of an earlier generation ; but he inherited the traditions of a great man, Li Hungchang, having been his secretary until 1883, and being essentially the representative of that statesman during his eleven years' occupancy of the Residency at Seoul. Even after the fall of his patron, Yuen rose to great power under the old Empress Dowager ; and, among other necessary things, he had learned when to take off a head. With a fair degree of ability, with much acquired statecraft, and by the unhesitating exercise of the power in his hands, he maintained his dominating position in the republic to the end of his life ; and it is probable that, but for his ill-advised attempt to seat himself on the throne of a brand-new empire, that life might have been longer. During his presidency he dissolved Parliament when he pleased, summoned it when it suited his plans, reduced it at times to a Rump Parliament, and, in short, was as much the Imperator of the Chinese Republic as Augustus was of the Roman Republic—but he kept China united under one government, and that government his, administered by means of Presidential Mandates.

Even under Yuen Shihkai the bureaucracy maintained all its old power, its old methods, and its old emoluments ; and after his death it was freed even from such restraints as had been imposed by him. The existing constitution had been improved from time

to time; but, with the growing evils in the State, the hour had obviously come for a new one; and that is the Draft Constitution which is explained with great lucidity by Dr. Tyau in the volume cited at the head of this article.

The New Draft Constitution.—"The sovereignty of the Republic of China is vested in the entire body of the people." This declaration does not exist in the constitutions of the United States of America (which is a federation of sovereign States) or of France, but it is found in those of Belgium, Chile, and the United States of Mexico. It may, however, be stated that the relations of the Chinese people to representative government are more on the level of the citizens of the Mexican republic than of the American.

All citizens are declared equal before the law. No provision is more necessary for the Chinese nation than this, none is more disregarded, and none will be more difficult of enforcement; but the exposition shows that the Swiss parallel—"There are neither political dependents, nor privileges of place, birth, person, or family"—served as model for China.

The citizens shall not be "arrested, imprisoned or detained in confinement, tried or punished or fined, except in accordance with the law," and, if detained, may apply for a writ of Habeas Corpus. The on-looker rubs his eyes. Can this be China? This is a startling innovation for China, and, if it can be carried into effect, it will constitute a revolution more far-reaching in its results than even the transformation of the empire into a republic.

The inviolability of residence and correspondence, freedom of speech and writing, and the right of assembly for a lawful purpose are provided for—quasi-natural rights in a democratic country such as a republic must needs be; but in China, when the governors are weak or are scared, the governed will find these rights far from secure.

The qualifications for the franchise are: adult males; payment of direct taxes of 2 dollars per annum (five years ago 4*s.*, now temporarily 8*s.*); or possession of immovable property of a value of 500 dollars (£50–100); or being a graduate of an elementary or higher school. The alternative qualifications are sufficiently low, but even so, in a country with such masses of poverty, many millions are excluded; with a nation so utterly ignorant of the very rudiments

of representative government, it is perhaps well that the franchise is thus restricted.

Powers of Parliament.—Parliament has the following powers: to enact new laws or revise old laws; to amend the constitution; to pass resolutions having the force of law; to initiate law bills, but not money bills; to interpellate the government and make recommendations to it; to elect the President and the Vice-President and (the Legislature) to impeach and (the Senate) to try these officers and Cabinet ministers; to approve money bills for levying taxes and for expenditure, and to supervise the expenditure; and to approve declarations of war and treaties with foreign nations. In the performance of their duties members of Parliament are entitled to full freedom of speech in Parliament, and to exemption from arrest unless arrested in the act of committing a crime; in such a case the reason for the arrest must be reported to the house of which he is a member.

Parliament is bicameral. The Senate consists of 274 senators; 10 elected by each of 22 provincial Assemblies, 54 elected by Electoral Colleges—27 by that of Mongolia, 10 by Tibet, 3 by Chinghai (Kokonor), 8 by the Central Educational Society, 6 by Chinese resident abroad. Their term is six years, one-third retiring every two years. In the composition of the Senate the constitution follows closely that of the American republic, in allotting an equal number to each of the provinces, irrespective of size, population, or wealth.

In one respect the Senate, in the powers it exercises, departs from the American precedent. In regulating the relations between one province and another, or between the central government and the provinces, the decision lies with the Senate, and not with the Supreme Court; moreover, if the President's warning to a turbulent or recalcitrant province is disregarded, he may, with the approval and consent of the Senate, dismiss the Governor or dissolve the provincial Assembly.

Money bills must first be presented by the government to the Legislature (the House of Representatives). The Senate may propose amendments, but, if these are not accepted by the Legislature, they are rejected. The Legislature also controls the Board of Audit. These provisions are much closer to British practice than to American.

The Legislature consists at present of 596 members, on the basis of one member for every 800,000 of population; but no province is to send less than ten members; and the dependencies (Mongolia, Tibet and Chinghai) send the same number as to the Senate. Their term is for three years.

In its control of money bills, the Legislature is under certain restrictions; it may reduce the government proposals, but cannot increase the proposed expenditure; in this respect, again China has followed British practice and not American. But Parliament may not "abolish or curtail any of the following expenditures:—

(*a*) Those belonging to the obligations of the government in accordance with the law.

(*b*) Those which are necessary for the observance of treaties.

(*c*) Those considered necessary in accordance with the provisions of law.

(*d*) Continuous expenditure."

The clauses (*a*) and (*c*) would seem to remove from the control of Parliament all payments under contracts and for the salaries of officials and government employees.

The President. — In the election of the President and Vice-President the French practice is followed. The two houses of Parliament unite in national Assembly; but, instead of election by an absolute majority as in France, the Chinese rule requires three-fourths of the number voting, with two-thirds necessary for a quorum. Under normal conditions this might easily lead to a dead-lock; but a further excellent rule provides that if, on the second ballot, no candidate succeeds in obtaining the required three-fourths vote, the two names highest on that ballot shall be submitted to the third ballot, in which a bare majority shall elect. The term of the President and Vice-President is for five years, and either may be re-elected. If the President vacates his post (on impeachment and conviction, or through death or resignation) or if he is unable to execute his powers (through illness or absence), the Vice-President will act as President to the end of the term or of the inability, as the case may be.

The theory of the constitution is that the President is the Chief Executive of the republic—this is the American practice; but at the same time he "has no initiative and simply concurs with what Parliament or the Cabinet, as the case may be, sees fit to decide"

—this is the ceremonial President of France. Which form may emerge in China at any given moment depends on the strength of the President—Yuen Shihkai was the State; under his successor the bureaucracy has ruled, an oligarchy at Peking, other oligarchies in the several provinces.

The President may veto bills passed by Parliament, but a vetoed bill becomes law if again passed by a bare majority. He convokes and dissolves Parliament; and, with the consent of the Senate, he may dissolve the House of Representatives alone. He appoints or dismisses all civil and military officers, but a few of the highest are subject to the approval of Parliament.

Yuen Shihkai governed by Presidential Mandates, which he ssued under his "emergency" powers. The constitution makers could not agree to continue these Cromwellian powers to succeeding Presidents, nor could they agree to abolish them; but, in the disagreement, the powers were dropped.

The Cabinet.—The Cabinet, "being the actual executive [as in France and the United Kingdom] its powers are naturally large, although its acts, to be valid, must be endorsed by the President, and the Mandates appertaining thereto must needs be sealed and promulgated by him." The appointment of the Premier must be approved by the House of Representatives, but not the other ministers. The ministers of the Cabinet are not members of Parliament, but "the ministers shall have entrance to both chambers, and shall be heard when they request it," or they may send delegates in their place. The Cabinet may propose law bills, and it has the sole right to initiate money bills; and Presidential Mandates must be countersigned by a minister, except one appointing or dismissing the Premier. So far the Cabinet finds its prototype most nearly in the late German Empire.

The Cabinet does not necessarily resign when Parliament rejects or amends its measures; but if a vote of censure on it is passed by the House of Representatives, it must resign, unless the President, with the consent of the Senate dissolves that House. This falls far short of the responsibility to Parliament in British and French practice, but it is a step in advance of the American.

The national Judiciary is independent alike of the legislative and of the executive branches of the government, its judges retaining their office during good behaviour, and their emoluments may not

be decreased. Judges are to be appointed by the President, but the appointment of the Chief Justice of the Supreme Court (and of him alone) is subject to the approval of the Senate.

Dr. Tyau's Commentary.—Such is a brief summary of the salient features of a constitution designed for a republic which might be in China or in Utopia. It reflects great credit on the body of earnest thinkers who drafted it, and its provisions have been analysed by Dr. Tyau with much lucidity. If the illustrations from the comparative legislation of such backward federations as the United States of Mexico (*non abest omen*) are more numerous than those from the constitutions of better ordered republics like France and the United States of America, the explanation is obvious. The two last named were intent on preserving their past, and building a new structure on existing foundations, merely substituting, for a previous arbitrary rule, a democratic administration such as would ensure the welfare of the people; France continued its unitarian government; the United States of America preserved the rights of the (originally thirteen) sovereign States and assigned to the federal government certain tasks in the common interest. The republics of Central and South America, on the other hand, inexperienced in self-government, made a clean sweep of everything in their past, and wrote their constitution on a blank sheet of paper. China has had no experience in representative government, and the designers of her constitution have written it on a clean slate; and they have succeeded so well in their task that it seems probable that the cosmothetic idealists of the new German republic or republics will make a careful study of its provisions in drawing up their own written constitution.

The draftsmen of this constitution are serious students and earnest thinkers. They are, generally speaking, the product of American, English, or Japanese universities, or of the schools in China under American and English teachers; and they have profited by their instruction. The zealots for revolution were those taught in Japan; but the level-headed leaders in reform were, for the most part, among those who had passed under American or English influences The result of their labours shows much thought, and—what is far more important—it shows also an intense patriotism. But, we are tempted to ask, do they live in a real world? Do they consider that the mere adoption of a constitution puts them in line with the

free republics of the West? Have they ever realised the inner meaning of the poet's lines?—

> For forms of government let fools contest;
> That which is best administered is best.

The leaders of Young China—and Dr. Tyau is among the most clear-headed of the writers on the aims of Young China—appeal to the justice inherent in international law, and they look forward to the security to be obtained under the ægis of the League of Nations; the one, they declare, has in the past been exercised only in favour of strong, *i.e.* armed, nations, and the other will protect the weak nations from aggression. As Dr. Tyau puts it (p. 213)—"But this country [China] stands for reason, not might, and Chinese philosophy teaches that reason is never so feeble that it must needs be reinforced by might." *A priori* there is much to attract one in such a philosophy; but the present is not a suitable time for urging the adoption of pacifist views, when we have seen the world's civilisation threatened by armed might, and, in turn, preserved from destruction only by armed might.

The Chinese are drawing on the future with a promise of perfect government, and, by virtue of that promise, they ask the cool-headed statesmen and publicists of the Western world, not yet committed to the pacifist view of the League of Nations, to wipe out their past debts incurred through bad and weak administration. Their claim to be allowed to regulate their own Customs tariff has much to be said for it. Even if the commercial nations may continue to withhold the free hand which they grant to each other, still it is anomalous that it should lie in the power of any and every one of nineteen nations, some of them with the smallest pretensions to commercial interest, to refuse its consent to the readjustment of the tariff which is admittedly necessary from time to time. It took three years to carry through the last revision (September 1901—September 1904) and even then one nation, Portugal, had not yet given its formal consent. The question of the foreign Post Offices, especially those at other ports than Shanghai, is another just grievance of China. But all these questions are dwarfed to insignificance by the privilege of extraterritoriality, which is, in fact, the foundation of nearly all of the foreigners' exceptional privileges.

Extraterritoriality.—More than most questions in the world, this *solvitur ambulando.* China says to the world : " Abolish the extra-territorial privilege, and we undertake, on our honour, to carry out such reforms as to justify the step " ; to which the world replies : " First show your good faith in reform by reforming, and we will then be prepared to relinquish extraterritorial rights." If any enthusiast in reform should be so bold as to declare that the precedent condition has already been fulfilled, the retort is obvious. The foreign merchant is pressing for the right to carry his trade into the interior ; and the foreign capitalist and engineer urge China to admit their capital and their expert knowledge which are so much needed for the development of her vast mineral resources ; to this the Chinese reply—" No, we cannot admit you ; you carry with you extraterritorial protection, not alone for your persons, but also for your capital and the power it gives, and that constitutes a danger to our administration." To this the foreigner replies that he does not trust the administration, and that he cannot forgo the protection accorded to him by his own government.

In conclusion the correctness, in a sense, of certain of the contentions of the representatives of the vigorous Young China, which looks so confidently to the future, may be admitted. International law *has* been exercised in favour of strong nations—but strong in orderly administration, in the impartiality of their judges, and in the incorruptibility of their officials. The League of Nations *will* protect the weak from aggression—but it will take under its ægis only those weak nations, whether their population is three million or three hundred million, which live up fully to the League's standard of good government, and will not avert from any nation the consequences of its own weak administration.

AUSTRALIAN ANTI-TRUST LEGISLATION.

[*Contributed by* The Hon. Sir Charles G. Wade, K.C.]

The first occasion when Anti-Trust legislation was placed upon the Statute Book of the Commonwealth of Australia was in 1906. The measure was not passed for the purpose of meeting any pressing emergency, but rather as a safeguard against the possibility of Trusts and Combines establishing themselves in Australia. "Combination" was the watchword of industrial life, and was acceptable to the community in so far as it stood for greater efficiency and economy both in production and distribution; but the experience of the United States of America had demonstrated that these great industrial organisations were capable (if not controlled) of being very injurious to the general public, and it was feared that, if the Meat Trust secured a foothold in a great producing country like Australia, it might be converted into a stranglehold.

All political parties, therefore, were alive to the necessity of taking measures for protection; they differed as to the methods. The Labour Party pressed the policy of nationalisation, but under the Constitution the Commonwealth did not possess this power. In the various States at that time there was no machinery in operation for dealing with injurious combines except the inadequate procedure of an action for conspiracy.

Industries Preservation Act, 1906.—In the year 1906 the Australian Industries Preservation Act was passed into law. It was framed generally on the precedent of like legislation in the United States of America. The chief purpose was to impose penalties on trusts or combines or monopolies which were injurious to the public interest, and which operated within the Commonwealth. Protective provisions were also enacted with regard to dumping, to meet those cases where the combines carry on business outside the jurisdiction, and unduly compete with local industries by flooding the market with cheap goods.

Inasmuch as the repressive conditions of the law subsequently became more drastic, it may be of interest at this stage to quote the terms of the original legislation, and thus the effect of later amendments can be better understood.

Ss. 4 and 7 of the Act No. 9, 1906, were as follows:

4. (1) Any person who either as principal or agent makes or enters into a contract, or is or continues to be a member of or engages in any combination in relation to trade or commerce with other countries or among the States—

(*a*) with intent to restrain trade or commerce to the detriment of the public, or

(*b*) with intent to destroy or injure by means of unfair competition any Australian industry, the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

is guilty of an offence. Penalty £500.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

7. (1) Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part or the trade or commerce with other countries or among the States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence. Penalty, £500.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

The penalties under ss. 4 and 7 were likewise made applicable to foreign corporations or trading or financial corporations formed within the Commonwealth, and who carried on the prohibited operations within the Commonwealth.

It would appear that, under the constitution of the Commonwealth, the Parliament had jurisdiction only in respect of trade and commerce which extends beyond the limits of one State—that is to say, it did not enjoy any powers of legislation in respect of the internal trade of the State. Yet it had power to make laws with regard to corporations formed within the Commonwealth, and definitely brought them within these penal clauses in the original Act. In the amending measure a few years later, "person" is defined as including corporations, and the one compre-

hensive clause now covers all cases of individuals, whether acting in a corporate capacity or not.

The position was shortly as follows: Any agreement of the character indicated in s. 4 was declared to be absolutely illegal and void; secondly, a definite offence was constituted carrying with it a penalty of £500 in case of conviction; thirdly, the Attorney-General, or any person authorised by him, could institute proceedings in the High Court to restrain by injunction, after hearing and determining the merits, the carrying out of any contract or any combination which was in contravention of s. 4 (see s. 10); fourthly, any person who was injured in his person or property by reason of any action of another in contravention of the provisions against combines or monopolies was empowered to sue for and recover treble damages for the injury (s. 11).

The Burden of Proof.—The remedies were fairly comprehensive, but in view of later amendments it is important to note at this stage that the essential elements of proof were *an intent to restrain trade or commerce to the detriment of the public*; and under the original Act the onus of proof lay upon the plaintiff (which in most cases was the Crown) to establish the offence against the offenders.

The ordinary rules in regard to the burden of proof were recognised, and with but one exception the recognised rules of evidence were observed.

It was decided in s. 11 (2) that no person in any proceeding under that section for the recovery of treble damages should be excused from answering any question put, either *vivâ voce* or by interrogatory, or from making any discovery of documents on the ground that the answer or discovery might incriminate; but his answer should not be admissible in evidence against him in any criminal proceeding other than a prosecution for perjury.

These powers, however, were fairly searching, and in those days, when large corporations were in disfavour, and liable to be the subject of "heresy hunts," the exercise of the powers under this Act might be invoked for oppressive or other indirect purposes. To guard against, therefore, the dangers of abuse, it is provided in s. 14 as follows:

(1) No criminal proceeding shall be instituted under this part except by the Attorney-General, or some other person authorised by him.

(2) No civil proceeding shall be instituted under this part without the written consent of the Attorney-General.

The original safeguard has been slightly modified in terms by subsequent Acts, but in the main legal proceedings cannot be initiated without the authority of the Attorney-General.

Prevention of Dumping.—Part 3 of the original Act is devoted to establishing machinery for the prevention of dumping. Whenever the Controller-General of Customs has received a complaint in writing, and has reason to believe that any person, hereinafter called the " Importer," either singly or in combination, is importing into Australia goods with intent to destroy or injure any Australian industry by their sale or disposal within the Commonwealth in unfair competition with any Australian goods, he certifies the Minister accordingly (s. 19).

Thus the machinery is set in motion. The Controller-General, in a certificate, specifies *inter alia* the grounds of unfairness in the competition ; but, before making the certificate, is bound to give to the importer an opportunity to show cause why the certificate should not be made, and must furnish the importer with a copy of the complaint [s. 19 (4)].

Subsequently, on receipt of this certificate, the Minister may refer to a Justice of the High Court the investigation and determination of the issue whether the goods are being imported with the intent alleged, and if so, whether the importation shall be prohibited, either absolutely, or subject to any specified conditions, restrictions, or limit conditions [s. 19 (5)].

The fact of such reference is notified in the *Gazette*, and from the date of the *Gazette* notice until publication of the determination of the issue any goods the subject of investigation are debarred from importation, unless the importer gives to the Minister a bond with sureties of such an amount as may appear to the Minister to be just and reasonable (s. 20).

The Justice then proceeds with the investigation ; he sits in open court and has all the powers of a Justice exercised in the ordinary jurisdiction of the High Court ; and in arriving at a decision he is to be guided by a good conscience and the substantial merits of the case, without regard to legal forms or technicalities, or whether the evidence before him is in accordance with the law of evidence or not (s. 21).

Here again it may be noted that no person in such an inquiry shall be excused from answering any question or producing documents on the ground that he may thereby incriminate himself, but his answer shall not be admissible in evidence against him in any criminal proceeding other than a prosecution for perjury.

The chief aim of such an inquiry is to ascertain how far the alleged unfair competition is injurious to the existence of those Australian industries, the preservation of which may be deemed by the Court to be advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers (s. 17).

S. 18 defines the conditions under which competition shall be deemed to be unfair; the chief indication of which is the evidence that Australian goods will be ousted from the market, that remuneration of labour will probably become inadequate, that industry may be disorganised or workers thrown out of employment. Further tests that are applied are, *e.g.*, that the competition is in fact unfair; or that the imported goods have been purchased abroad at prices greatly below their ordinary cost; or that they are being sold in Australia at a price which is less than gives the importer a fair profit upon their fair foreign market value (s. 18).

A special proviso is inserted whereby cheapness is allowed to operate in the interests of the men on the land. In respect of certain agricultural implements, the presiding judge is to determine whether the goods are being imported with the effect of benefiting the primary producers, without injuring any other section of the community [s. 21 (8)].

The determination of the Justice is final and conclusive and without appeal. The determination is transmitted to the Minister, and forthwith published in the *Gazette*.

If the finding of the Court is adverse, then the determination, when so published, shall have the effect of a proclamation under the Customs Act, 1901, prohibiting the importation of the goods, either absolutely or subject to conditions, as the case may be, and consequently, under the provisions for that Act, further importations becoming legal.

The machinery with regard to dumping has remained unchanged during subsequent years, but there have been various amendments in the direction of tightening up the law in respect of trusts and monopolies.

Unfair Competition. — Under the original Act of 1906 unfair competition referred to in s. 4 had been defined in various ways, and amongst other things the granting of rebates as a condition of tying trade was declared to be effects of unfair competition [s. 6 (1 D)].

By virtue of the Act No. 26 of 1909, s. 5, the facts which, broadly speaking, had been only evidence of unfair competition, are now created a substantive offence. A more important inroad upon the laws of evidence was established by the Act No. 5 of 1908, s. 4, which provided as follows:

In any prosecution for an offence against ss. 4, 5, 7, 8 or 9 of the original Act, the averments of the prosecutor contained in the information, declaration, or claim, shall be deemed to be proved in the absence of the proof to the contrary, but so that (*a*) the averment in the information of intent shall not be deemed sufficient to prove such intent; and (*b*) in all proceedings for an indictable offence the guilt of the defendant must be established by evidence.

About the year 1909, the first and the leading case, known as the Vend Case, was initiated in the High Court. A number of colliery proprietors in New South Wales had been engaged over a period of years in severe cut-throat internal competition, with the result that the coal trade was injured; the prosperity of large towns dependent on the coal industry was injuriously affected, prices were unremunerative and wages were depressed. In order, therefore, to establish improved conditions, an agreement was made amongst the parties interested to restrict the output and obtain higher prices for the product from the consumer. It was thus urged that the industry would be put upon a stable footing, and the large cities benefited which were dependent upon the coal industry.

Proceedings were lodged by the Commonwealth against the coal proprietors for an offence under ss. 4 and 7 of the original Act. The case was heard before a Justice of the High Court in the first instance, who, after a lengthy hearing, determined against the proprietors; but the High Court of Australia subsequently reversed this decision, holding that the Crown had failed to establish the necessary ingredients of the offence (see 15 Commonwealth L.R. 65).

In the course of their judgment the High Court delivered an interpretation of the Act, and among other things they laid down

that it is incumbent upon the Crown to prove not only an intent to restrain trade and commerce, but also an intent to cause detriment to the public. Further, that although the agreement might be in restraint of trade, it is not necessarily detrimental, and also that the issue of detriment is not to be inferred from the fact that the powers conferred by the agreement might be used to cause detriment. The judgment recognises in short that an agreement to restrict output and also to raise prices is not necessarily an offence under the Statute.

One test which would tend to establish the offence no doubt would be the extent of the restriction and of the price charged, the unreasonableness in either respect being some evidence to prove the offence.

The Law in Force.—Shortly before the judgment of the High Court, but possibly in anticipation of their decision, Parliament had in November 1910, by an Act No. 29 of 1910, introduced some sweeping amendments into the original legislation with regard to combines and monopolies. The law as it now stands is as follows:

Any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of or engages in any combination in relation to trade or commerce with other countries or among the States:

(*a*) in restraint of or with intent to restrain trade or commerce; or

(*b*) with intent to destroy or injure, by means of unfair competition, any Australian industry, the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, or consumers,

is guilty of an offence—Penalty £500, or in the case of a continuing offence, £500 for each day during which the offence continues.

Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

It shall be defence to a proceeding for an offence under para. A of sub.-s. 1 of this section in answer to an allegation that a contract was made or entered into in restraint of or with intent to restraint of commerce if the party alleged to have contravened this section proves

(*a*) that the matter or thing alleged to have been done in restraint of or with intent to restrain trade or commerce was not to the detriment of the public; and

(*b*) that the restraint of commerce affected or intended was not unreasonable.

S. 7, sub.-s. 1, now reads:

Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States the supply or price of any service, merchandise, or commodity, is guilty of an indictable offence. Penalty, £500 for each day during which the offence continues, or one year's imprisonment or both, or in the case of a corporation £1,000 for each day the offence continues.

Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

It will be noticed it is now sufficient to allege, under s. 4, an agreement to be simply in restraint of trade. Under the provisions of s. 4 of the Act No. 5 of 1908, the issue of restraint of trade is proved by the mere averment, and a *primâ facie* case of guilt is established against the defendant. The onus of proof has been changed, and it is for the accused to show by way of defence that the matter or thing alleged to be in restraint of trade was not in fact to the public detriment, and that the restraint was not unreasonable.

The case for the Crown is established practically without calling evidence, and the burden of affirmative proof in these two respects lies upon the defendant. A very different situation is thereby created. Under the original law, the onus of proof lay upon the Crown, and it was necessary to establish an intent to restrain trade, and an intent to cause detriment to the public.

This change of the law, coupled with the alterations with regard to proof to be mentioned directly, leaves few opportunities for evasion on the part of an injurious combine. At the same time, this change in the law may have the effect of bringing within its reach a class that was not originally contemplated.

It would appear that in a country where strikes are illegal, and machinery for peaceful adjustment of industrial disputes is always available, that the organisation that combines to indulge in a sympathetic strike for the purpose of coercing the public to yield to the demands of kindred organisation, may find their action covered by the terms of the present law with regard to combines in restraint of trade.

It will be noticed that the alteration in s. 7 is of a similar character. The mere fact of a monopoly or a conspiracy to establish a monopoly now constitutes an indictable offence, without proof of an intent to control the supply of an article to the detriment of the public. Wide and searching powers are conferred upon the authorities who are extracting information with regard to a suspected offence under the Act. The original Act provided that the witness could not claim the privilege against answering questions written or oral put to him in an action for treble damages, but by virtue of s. 7 of Act 29 of 1910, this compulsion is extended to any form of proceeding for an offence of an alleged combine or attempt to monopolise. Further, by s. 4 of Act No. 5 of 1908, it is provided that the Controller-General may require any person or corporation to produce to him all books and documents relating to the subject matter of the alleged offence. He may further inspect such books and documents, and make copies or extracts from them. The Controller-General further may impound such books or documents provided that he supplies the person affected with a certified copy of the same.

The only protection afforded to the defendant or the person so requested is that a complaint shall be first lodged in writing with the Controller-General that an offence had been committed against the Act, and he must be satisfied that an offence has been committed. Further, no official is allowed to disclose any information gained by him in the exercise of these powers above mentioned.

Lastly, by s. 7 of the Act 29, 1910, it is provided that, in any proceeding for an alleged combination in contravention of the Act, any document containing a note or record of any proceeding at any meeting of the persons inculpated, or any entry purported to be a copy of or extract from the above-mentioned document, shall, on proof that it was produced by or came from the custody of any of those implicated, be admissible in evidence against such persons and, moreover, be evidence that the matter and things thereby appearing to have been done by these persons were so done, and that any person thereby appearing to be present at the meeting was so present.

The powers so conferred are almost unlimited and comprehensive. The machinery for shedding light upon the operations of

injurious trusts and combines should be effective, but it may be argued that they are unnecessarily severe. There is no doubt that in these days, when the contrast between capital and labour is being vehemently accentuated, unless the interests of all concerned are carefully safeguarded, hardship and even injustice may be suffered by large business organisations. The only protection against the launching of a prosecution is the consent of the Attorney-General. The only condition to issuing a summons to produce documents and answer questions is the belief of the Controller-General that an offence has been committed. If wisely administered these should be a sufficient protection, but when class prejudice is rampant, and is the ground for party cleavage, it requires a clear head and a strong will to resist political pressure for prosecution.

After all, the greatest corrective to the working of secret trusts and monopolies is publicity; and in my opinion, if the machinery was established for making public the conduct and earnings of business concerns, the cost of production and profits, a twofold purpose would be accomplished. Not only would alleged combines be relieved of many unfounded suspicions on the part of the public, but by ensuring that extortion should be publicly exposed much would be done to prevent it from being practised.

THE FOUNDATION OF THE BOMBAY HIGH COURT.

[*Contributed by* P. B.-M. Malabari, Esq.]

In Chapter V. of *Bombay in the Making* the present writer has attempted to give, from the scanty materials then at his disposal, an account of the administration of justice in the town and island of Bombay from 1670 to 1726. The credit of establishing law and order in Bombay in those early and turbulent days belongs to the far-sighted Governor, Gerald Aungier. For it was he who passed certain orders at a consultation held on February 2, 1670, for the purpose of regulating the administration of justice in the locality. The town and island of Bombay was divided into two parts or precincts, in each of which five justices, *all Englishmen*,[1] being qualified for the purpose, were appointed to administer justice, three forming the quorum. These justices were known as " customers " and their services were purely honorary, though they were allowed certain privileges of trade, probably to compensate them for their trouble. These justices were empowered to appoint their own " Perbes " (Prabhu clerks) and other necessary officers ; a register was ordered to be kept of all sentences, resolutions, executions and judgments, and a constable was appointed for every parish within these two precincts. Aungier was fully conscious of the danger with which the experiment of investing these " customers," mostly traders and sublimely ignorant even of the rudimentary principles of law, with judicial powers, was fraught. He therefore decided upon the establishment of a Court of Appeal, consisting of the Deputy Governor and his Council. This superior Court, besides hearing appeals from the inferior Court, was empowered to try " all suits and actions whatsoever between man and man for lands, goods and sums of money above the value of 200 Xeraphins " ; it was also entrusted with the administration of criminal justice in the town and island of

[1] Only Englishmen were appointed justices in those days, probably because no natives were found qualified for such a trust then.

Bombay. In this Court all trials were to be by a jury, and exact registers of their proceedings were kept, "that the equity thereof may appear to all whom it may concern." It was perhaps somewhat presumptuous on the part of the Deputy Governor and his Council to form themselves into a Court of Appeal and to sit in judgment over the decisions of the inferior Court, for of law and procedure the judges of the Court of Appeal could not have boasted much greater knowledge than that possessed by the "customers." Presumably the Court of Appeal was constituted mainly as a sort of check on the vagaries and illegalities of the "customers," and with the object of inspiring confidence in the heterogeneous population of Bombay in this interesting experiment in the realm of justice. Both these Courts must have attempted to administer justice in accordance with the laws of England, and no doubt they did this in obedience to the dictates of their conscience. In 1670 a special Code was published for their guidance. No trace of this code—probably the first Procedure Code in India—can be found at the present day, but its publication is vouched for by the following entry in the Consultation Book for 1670 :

> It is unanimously resolved that those laws which concern the administration of justice and common right, the form of judicature, and the penalties appointed against performances, breaches of morality and civil government, shall be translated into the Portuguese and Kanarese languages and be published with all convenient speed, and the others deferred till further consideration.

Willcox's Procedure Code.—Two years later, another and probably a more elaborate Procedure Code was prepared, with the help of certain law books which the Court of Directors appear to have sent to the Company's servants in Bombay in 1672. For in a letter from Surat the Governor and Council write to Bombay as follows :

> Mr. Geo. Willcox hath informed y^{t} he hath drawne up a forme of Legall proceedings w^{ch} he intended to present him wth on his arrival at Bombay, w^{ch} forme wee would have him send up hither y^{t} wee may debate and consider thereof.

In the history of the administration of justice in Bombay in the days of Gerald Aungier, this Procedure Code drawn up by Mr. George Willcox and submitted to the Governor and Council at

Surat for their consideration has an important bearing. The manuscript, from which a copy[1] has been supplied to enable me to write this article, passed into the custody of the British Museum (Add. MS. 39255 E) a few years ago. It is a pity—I had almost said shame—that such a valuable document of great historical importance, dealing with the establishment of the English law in the town and island of Bombay, should lie thousands of miles away from this city, the home of its birth.

Description of the MS.—In spite of the lapse of two centuries and a quarter, the Willcox MS. is still preserved in a fine, clean condition. It consists of twelve large folio pages ($9\frac{1}{4} \times 13\frac{3}{4}$ in.) legibly yet closely written, with thirty-three to thirty-eight lines on a full page and averaging fourteen words to the full line. The outside bears the following endorsement: "George Willcox Narrative concerning the establishing the English Laws on Bombay. No. 31. Rec'd August 1673, p. the Loyall Merchant." So it seems that the Bombay Government sent a copy of this Narrative to the Court of Directors in England per the "Loyal Merchant" in 1673, with a covering despatch which is preserved in the Records of the India Office. Before setting forth the various clauses of the MS. in detail, a brief summary of its contents may be found useful. George Willcox thus begins his Narrative:

> According to the Gov^rs command, I have drawn up a Narrative of the Establishment of the Law on the Island Bombay as it is now settled and confirmed by him since his coming upon the place which is as followeth.

Then follows an account of Governor Aungier's arrival in Bombay from Surat, on which memorable day a fast was observed, and a Proclamation issued against the breach of the Sabbath and against drunkenness, profaneness, and other like vices. Divers petitions were then brought in by the several castes inhabiting the island, praying for the establishment of the English law in the town and island of Bombay, whereupon another Proclamation was issued "for abolishing the Portugal Laws and all offices from and after the first of August next and establishing the English Law." Willcox was directed to draw up a scheme for the purpose of regulating the administration of justice, which he did "in several three

[1] The extracts in this article have been verified with the original.—C. E. A. B.

papers." The first of these papers settled the constitution of the Court and the form of summons to be issued and the manner of serving the same, and a table of fees was also prepared. The second paper dealt with the " settling an office for proving the Wills and granting administration " and laid down the mode of procedure to be observed in testamentary and intestate matters. Officers were also appointed for the purpose, the fees to be taken by each and other incidental charges were fixed and the method of keeping books and inventories decided upon. In the third paper Willcox described the " manner of keeping a Sessions," dividing Bombay into " hundreds " for the purpose. It also decided upon the form of warrants to be issued and served in criminal matters, established prisons, laid down rules for prisoners and specified the duties of the various officers of the Sessions. The Governor and Council having approved of this scheme, Willcox was appointed Judge of the town and island of Bombay ; he was also placed in charge of the office of Wills, and was to act as Registrar of Mortgages, Deeds, etc. The Judge was directed to study the law and to give an undertaking not to engage in any trade or commerce in consideration of the salary of £25 per annum. The Governor and Council thought, and rightly thought, that so great a day as that which marked the establishment of the English law in Bombay should not pass without due celebration and some favours shown to the people, " for had there been no solemnity," they shrewdly observe, " with this change, the people's disesteeme would have been greater than their satisfaction." It was therefore decided to release the prisoners then in jail, and medals were also ordered to be struck and flung among the people on the occasion. Unfortunately, the celebration of that red-letter day in the history of Bombay, the 1st of August, 1672, had to be postponed till the 8th owing to the " prodigious quantity of raine " that seems to have deluged Bombay on the 1st. As soon as these preliminaries were over, a solemn procession was formed and the whole assembly met at the Guild Hall of Bombay, where the company's patent and the commission to the Governor were read, and Willcox was sworn in as Judge, followed by other judicial officers in their respective appointments. Then Governor Aungier made a long and most interesting speech befitting the occasion. At the conclusion of the speech Judge Willcox presented a petition for the release of prisoners, which was graciously granted.

The Governor then vacated the chair in favour of the Judge as representing the majesty of the law. This practically completed the whole ceremonial, whereupon the Governor marched on foot to the fort, and on the way medals were again flung to the crowd, salutes were fired, and bonfires lighted. Willcox closes the Narrative by citing a few examples of cases already dealt with before the Court, and the sentences passed on the offenders. It is interesting to observe that the sick and the destitute were not forgotten on that memorable occasion, for a hospital was provided for the sick "that care may be taken of them by the Doct^rs and this to be done w^th^out charge to the Hon^ble^ Comp^a^." This is the bare outline of the account Judge Willcox sent to his masters in England. Let us now turn to the original manuscript and fill in the interesting details.

The Proclamation of English Law.—After describing the preliminary proceedings, Wilcox records that

> his Hon^r^ ordered me to bring in the forme and method of proceedings in a Court of Judicature, and the manner of settling al things as neare as possible according to the Custome and Constitution of England, which having done in three several papers, he was pleased to issue forth his Proclamacon for abolishing (from and after the first day of August next) the Portugal Laws, and for establishing the English, and likewise to make void al Commissions of the Peace in the Portugal hands.

Sir Erskine Perry was therefore fully justified in the conclusion he arrived at in the case of *The Advocate-General* v. *Richmond*,[1] that there was not the least vestige of Portuguese law or Portuguese courts in Bombay at any time after the cession of the port and island by the King of Portugal to Charles II. "The broad fact remains," he observes, "that the English law was introduced into Bombay at the date of the cession, and has since prevailed."

Willcox then settled the form of the summons and the method of serving it: "In case of non-appearance, Oath to be made in open court, that the summons was served by the messenger. . . . The next court day after summons the plaintiff to give in declaration. Two court dayes after Declaration to come to a Tryall without sufficient

[1] Perry's *Oriental Cases* 573.

cause shewed to the contrary." Officers of the Court were then appointed and a Table of Fees was settled. "The party imprisoned, if he hath a visible estate, and wil not make sale of it towards paiment of his debts in six months time, sale shal be made for him and he released."

Testamentary Jurisdiction.—Willcox's "second paper," which dealt exclusively with testamentary and intestate matters, runs as follows:

The second paper was reasons for setling an office for proving of wills and granting administrations which are as followeth.

The law cannot have its current w^th^out this Establishm^t^. What law can take hold of an Executor w^th^out he takes upon him the execution of the wil; an Executor in a wil is only nominal, tis the probate makes him legal.

If the Testator dies in debt no Creditor can sue his Executor w^th^out he takes upon him the Probate; should any bring action against him, how would he ground his Declaration: it must be either an Executor or Administrator: how can that be when he never did administer.

This setlement quiets the mind of al people, they being in a capacity to recover their own, an Executor taking upon him the Execution of a wil has as much power to sue any man, as any man has power to sue him; here the Law has its current, & every man wil injoy his right, & w^th^out this the best part of the law signifies little.

Officers were then appointed for the above purpose, fees settled and certain rules framed for inventories and accounts to be filed:

Al wills to be registed and bound up and to be kept as records in the office & the original wil to be there also.

BOOKES TO BE IN THE OFFICE

A Booke of Probates, Administrations, Caveats and a Calender. these to be renewed every yeare at the charge of the Register.

Al Inventories to be brought into the office, or the parties to be fined, The reason for this is because if Inventories are not brought in, Estates will be concealed, and so Creditors wil be defrauded.

The charge of an Inventory is two rupies a length, it being twice writt over, one for the partie, the other to remaine in the office.

An account to be likewise brought in, the charge the same w^th^ the Inventory.

Sessions.—Willcox's third paper contains "the manner of keeping a Sessions, and deviding Bombay into hundreds," as follows :

Bombay to be devided into three hundreds, the Hundred of Bombay, of Maym, and Mazagan, each hundred to have a Justice of the Peace and Constable.

A Sessions to be held every month, the Justices of every hundred to be there ; the place Bombay, and the Sessions to be kept where the court of Judicature is kept.

Upon every complaint made to the Justices, they to issue out their warrant, the crime to be incerted in it, the Constable to serve the warrant, if possible, the Justices to make freinds,[1] if not to binde them over to the Sessions taking security for prosecuting & appearing, sending the examination to the Clerk of the Peace and he to draw up an Indictment ; if no security can be found, the party to be sent to the Gaile til next Sessions, there to be heard before the Judg and Justices.

Two prisons to be ordered, one for debt, the other for felons, both to be in Bombay, and the prison^rs of each hundred to be brought thither by the Constable. A sufficient person to be chosen keeper of the prison, he to put in security to the Judg against al escapes, and he to pay the debt of al escapes and to be recovered by Law. Upon al escapes of felons and murders the keeper to be imprisoned & to be severely fined.

So the post of "keeper of the prison" was by no means a sinecure. He had not only to pay the debts of all debtors (recoverable by law) who escaped from his charge, but he was fined and even imprisoned in lieu of those criminals who escaped from their own imprisonment. He then made out a list of the officers belonging to the Sessions as under :

Clerk of the Peace, Clerks, Cryer and Interpretors. A Constable to serve but one year, a new one to be chose every Easter Munday by the major voices of the Inhabitants, he to be sworne at Sessions. Every hundred to chose their own Constable, and no Constable to serve any warrant but in his own hundred.

Church wardens to be annually chosen and sworn at the Sessions, they to see al people come to prayers mornings and evenings al defaulters to present them at the Sessions, as also al drunkenness, swearing,

[1] It is not quite clear what is meant by Justices making "freinds." Perhaps if they personally knew the party lodging the complaint, they did not enforce security for their prosecuting and appearing at the time of the trial. Or can it mean to reconcile the parties and induce the prosecution to withdraw the summons, though this is not quite consonant with modern English ideas of criminal justice ?

uncleanness and other Debaucheries that they may be fined according to their Crimes.

Overseers of the high waies to be annually chosen, they to act as near as may be according to Law, Custome and Convenience of the place.

A Register to be made to register al mortgages, sales, deeds, conveyances and alienations, &c.

A Coroner to be made to enquire after al murders & casual deaths & to return them into sessions, he to be an able man.

The Appointment of Judge.—The method of administering the English law in the town and island of Bombay having been thus settled, the proposals made by Judge Willcox were freely and fully debated by the Governor in Council:

Where the Govern^r^ was pleased, weighing every particular w^th^ the Council, to approve of the whole, and ordered that the Island should be governd according to this forme, & that every one should give obedience thereunto.

There still remained the choice of officers to be made, particularly of the Judge, and the passage in the Narrative relating to this appointment it so piquantly worded that it may be quoted in full:

His Hon^r^ after this fel upon the choice of fit p^r^sons to act in this great and weighty affair, where like a prudent and wise senator, he discoursed very excellently upon the office and place of a Judg, declaring that a p^r^son qualified for that imploy, should be prudent, knowing, grave and upright in his life and conversation, desiring that they would likewise consider, that the Hon^r^ of our English nation depended upon the choice of such a p^r^son. This being so wel performed, and he having received such satisfaction from the method brought in, was pleased to nominate me to officiate as Judg, I was so surprised; knowing my inabilities to undertake so great a charge, desired his Hon^r^ to make choice of another, whose parts were more able to performe so great an imploy, but the whole Council approving of the choice, imediatly voted me to stand, ordering that I should fit, and prepare myself against the time appointed and likewise find out a house, where the Court of Judicature should be kept.

Judge Willcox taxes our credulity too much when, like Charlemagne, he professes to be surprised at the Governor appointing him to that high place. For he must have known that there was prob-

ab y nobody in the town and island of Bombay at the time so learned in the law as he. It was for his knowledge of law, such as he possessed, and also of practice and procedure in England that Aungier called upon him to draw up "the three severall papers" which together may be said to form the Magna Carta of our High Court. But if his surprise is disingenuous, it also testifies to his innate modesty. His tenure of office was very short, barely extending over two years, for he died in 1674, followed by one Mr. Nicolls in 1675. Nicolls, however, seems to have proved unworthy of the charge entrusted to him, and in 1677 he was suspended for wilful disobedience to his masters. Against Willcox, on the other hand, there is not a word or whisper that can detract from his merits as a judge or his virtues as a gentleman. He seems to have filled this important position, second only to the Governor's, to the entire satisfaction of Government and the people, and with credit to himself.

The testamentary and intestate jurisdiction of the Court was also vested in the Judge, as appears from the following passage :

> The next thing that offered was setling the office for proving of wills and granting administrations, the Gov^r was pleased to conferr that upon me, w^ch I accepted as having been breed three years a clerk in the Prerogative office, is Hon^r after this endeavouring to leave nothing undone, that might make the place happy, produces the Hon^ble Comp^a, orders for settling a Register, for registring al mortgages, Sales, Deeds, Alienations, &c., which Registry I have also accepted as belonging partly to the Law, as likwise the establishing a court of Conscience.

The Judge's Income.—In those days all the officers of Government indulged in trade and supplemented their income, slender as a rule, by this means. The leaves of the Pagoda tree in the East were just then sprouting, but even at that time the possibilities of the infant plant growing into a mighty tree, giving shelter to thousands under its shade, were clearly visible. But Aungier was acute enough to see that the Judge at least should be above all trade and all the favours trade brings in its train. To allow this functionary to indulge in commerce would seriously jeopardise his independence. The following embargo was therefore placed on the Judge :

> This being done the Gov^r and Council tooke me off of al manner of

trade & commerce, appointing me wholy to the study of the Law, and to spend my time in reading such bookes as might advantage me to performe my duty in so high a place. This disinabled me from improving that little stock w^ch^ was spared from my wife and children. I must be no merchant, so that I can neither serve yo^r^ Hon^r^ in trade, nor advance my fortunes by commerce, I can expect no riches, but what my salary wil make, and truly 25 £ p. annum wil be but litle. A penny improv'd may turn to a pound, but when that is denied, it wil be just like the man's talent in the Gospel; it was the same when he took it out of the ground as when he put it in. This applied, wil be just as I came out, so I returned. I hope I shal not gain yo^r^ Hon^r's^ displeasure by this, I humbly throw myself and concernes at the Hon^ble^ Comp^as^ feet not questioning, but if anything be done to make myself and family somewhat happy, their Hon^rs^ wil not be displeased w^th^ it, especially when their Interest is no waies prejudiced.

From the above passage it is clear that Judge Willcox was reluctant to give up trade and thus lose the opportunity of improving the penny which "may turn into a pound." He was evidently not a prosperous man, and the salary of £25 per annum certainly did not err on the side of liberality. But Willcox, wise man that he was, admitted the force of the Governor's contention, that the Judge should be above all trade and above all favours, and accepted the situation cheerfully, throwing himself at "yo^r^ Hon^rs^ feet." Unfortunately, however, his faith in the generosity of his masters was not well-requited, as we shall presently see. Next came the question of the Judge's salary and his perquisites, which was settled as follows:

My salary came next in debate w^ch^ before anything like a proposal came, several things were offered, it was thought convenient I should keepe house, and my table should be so furnished that their Hon^rs^ should have creditt, and strangers entertainment, this took up some time, for the Gov^r^ debating the Hon^ble^ Comp^a's^ interest, tooke care they should not be charged, yet something was to be done, that a creditt might go along w^th^ this new setlem^t^, and it was agreed that I should have an esteeme put upon me, by living somewhat answerable to my place; things standing thus, a sume was pitcht upon, which was 2000 rupies annually, and that to be paid out of fines, provided they were sufficient, if not to be made up out of the Treasury, this past w^th^ some little difficulty, because yo^r^ Hon^rs^ were wholy considered, before the sume was concluded. I hope, as the Law has a repute upon the place, so it wil

not be chargeable to yo^r Hon^rs. The Island is so poore that forma pauper have been most of our client, but hitherto, al officers, as Clerks, Tipstaves, messengers, Interpreters of the Portugal and Cannary language, and al charges belonging to the monthly Sessions, have been paid by mee out of fines. As to myself I had rather have yo^r Hon^rs favour w^th a little then abundance w^th displeasure, but question not, as the Inferior Officers have their being from the Law, myself wil not be excluded. This being so, I humbly beg that what hath past, yo^r Hon^rs wil approve, and that yo^r great wisdomes wil be satisfied, that nothing was done, nor acted, before yo^r Hon^rs concernes were debated, w^ch being truly considered, I am verily perswaded that where yo^r servants are made happy through honest means, yo^r Hon^rs wil rather encourage them, then he dissatisfied.

The most interesting point in the above passage is the liberty given to the Judge to keep his house and table in a manner worthy of his high position and to entertain strangers at the cost of Government. The provision made for the purpose, Rs. 2000 per annum, seems almost extravagant, compared with the miserable pittance allowed to the Judge as salary, viz. £25 per annum. But Wilcox seems to have been a singularly contented man, for though he felt that his salary was miserable, he assured his masters that he would "rather have yo^r Hon^rs favour w^th a little then abundance w^th displeasure." He expressed the hope, however, that his services would be better requited later, if his masters found him worthy of such requital—a hope, alas! that was never fulfilled. For in 1677 the Bombay Government sent:

a petition of the Widdow of y^r late Judge Mr. George Willcox, he having received no sallary here for the time that he was Judge here. She therefore begs yo^r Hon^rs to consider her condition and order her y^r pay^mt of w^t convenient sallary yo^r Hon^rs shall deem her husband to have merited.

Why no salary was paid to Willcox while he was Judge in Bombay it is difficult to say, nor are there any means of ascertaining if his unfortunate widow's petition was granted. For the credit of General Aungier and for the good name of the Bombay Government, let us hope that it was. Aungier himself must have felt that the Judge's salary was niggardly, for in a letter written by him from Surat, dated December 18, 1675, we find the following interesting passage:

As to ye Judges Sallary, having respect as well to o^r M^rs orders as also to his present condition and ye quality of ye employ^mt, wee have ordered that his salary be £120 to be paid him quarterly and to begin from his entrance into office, and y^t he be allowed a horse or Pallankeen with a Sumbrera boy, as also a Gowne yearely at the Comp^as charge.

This substantial increase in the Judge's salary, from £25 to £120, had a curious effect on the man who succeeded Willcox as Judge, for it seems to have turned his head, and Nicolls J. behaved himself in such an arrogant manner that he had to be suspended in 1677. Soon after his suspension, the question of reducing the Judge's salary came up for consideration. In an interesting letter dated November 11, 1677, the Bombay Council observe :

Wee doe not see ye absolute necessity of allowing 120 pounds to a Judge, not that wee would have ye Island destitute of a person invested w^th authority to determine the weightiest causes, but ye very name sounds too great for ye place. It looks like the great Gate of little Pendus that made Diogenes afraid ye citty would runn out at them. Those who come out to these parts are commonly mean persons or young men but very little skilled in our law, and ye name of the Judge does fill y^m with such a pride that they loose y^r reason in the contemplation of their greatness and think no man y^r superior, scarcely y^r equall ; and if he that is ye principle Justice, be invested by ye same power and act by a full commission, why is it not the same thing. It is not ye name that makes any difference.

Mr. Justice Nicolls must have conducted himself shockingly to drive the Bombay Council to write in such terms of disgust, bordering on despair. Indeed, they would appear to be so thoroughly scared that, instead of reducing the Judge's salary, they appointed no Judge whatever for some years, with the inevitable result that lawlessness was rampant in Bombay towards the end of the seventeenth century, and great disorder prevailed. Matters came to such a pass that the Court of Directors hastened to grant another charter in 1683 in order to put an end to the many " disorders and inconveniences which have happened and been committed " in Bombay, and they resolved to send out a man well versed in civil law direct from England, presumably with the object of overaweing the mutineers and other mischief-makers. In the despatch they sent to the President at Surat on April 7, 1684, they wrote :

We have chosen Dr. St. John, Doctor of the Civil Law, to be Judge of the admiralty court in the East Indies and of all our maritime affairs there, to be erected in pursuance of His Majesty's additional charter of the 9th August last (1683) at the salary of £200 a year, and to have the accommodation of his own diet at the Governor's table at Bombay, but all other accommodations for himself and his two servants are to be at his own charge, and to take place at the Governor's table as second.

Governor Aungier's Speech. — This narrative of the establishment of the Bombay High Court may be concluded fittingly with some extracts from the speech of Governor Aungier in which he commended English law to the attention of the people.

In al great and publick alterations of Law or Governm^t^ (he said) wise men have observed that the minds of the people receive impressions of satisfaction or disgust according as their passions or interest does incline them to like or dislike the change.

I nothing doubt but in a body composed of soe many casts of people as are on this Island some though very few disaffected persons may be found, who more in regard to their owne ends then to the publick good doe privately wish this change had not bin, but that the old customes had bin continued; However in the maine I dare boldly affirme that the best and most sober part of al the several Inhabitants, nay even of the Portuguese themselves, are exceedingly satisfied and receive the establishm^t^ of the English Laws w^th^ much assurance of happiness and security therefrom.

Two things have caused some admiration in the minds of wise and considering men as wel among ourselves as of our neigh^rs^.

First, why the English having possession of this Island now seaven years have not in all this time governed by their own Laws.

Second, why this Port and Island hath not thryven in trade and repute according to expectation, seeing the English are known to be a nation soe happy and successful in their enterprises that wherever they plant their foot through the blessing of God on their Industry and Trade & riches doe attend them, as not only India butt most parts of the habitable world can beare them witnesse.

To the first consideration I shall say nothing at this time, but to the last I am free to declare my judgm^t^ that the only cheif reason why this Island Bombay hath not increased in trade and splendour, hath bin for want of the English Laws.

But in this my assertion I would not be misunderstood, for I speak not this in degrodation of, or dishonor to, the Laws of the Kingdome of Portugal, for I know and declare them to be excellent, wise

and pious Laws; but as it is manifest that all Country and Kingdomes are governed by Rites, Customs and Constitutions in the execution of the Laws peculiar to themselves, soe tis an undoubted maxime that those constitutions may stand w^th^ the good and publique benefit of one nation, w^ch^ wil not square or beare proportion with the Interest of another.

This is the true state of the case w^th^ us, the English interest on this Island Bombay I may well compare to an hopefull child fed w^th^ forreigne milke w^ch^ not agreeing w^th^ its naturall constitution hath hindred its growth and increased evill humours. But now being restored to the breasts of its own mother, there is no question through the Providnce of God it wil in time grow in stature, good fortune and in favour with God and man.

* * * * * *

Many nations have bin famous for just and wholesome Laws, as the Jews, the Athenians, the Lacedemonians, the Persians & Romans & others. As to our Laws, I shal not enter into a large encomium of them, but in briefe tell you, that these Laws, I say the Nationall Laws of England, as also that excellent Abridgem^t^ of them recommended by the Hon^ble^ Comp^a^, are grounded on the Laws of God written in his holy word, and on the Laws of Nature stamped on the heart of man, and they are compiled from the quintessence or best part of al other Laws, especially those of the Roman Empire w^ch^ in their time are held as sacred, but herein ours seem to have the advantage in that they are free from the laborious Ceremony^s^ of the one, and from the Tricacy and Corruption of the other.

I do therefore pronounce you the Inhabitants of this Island of what qualitie soever to be most happy in them, and I do require you all in the name of his sacred Majes^tie^ and of the Hon^ble^ Comp^a^ to acquiess therein, assuring yourselves of justice and security in your lives, in your liberties, in your families, in your estates, goods and prosperities and whatever you can in equity pretend to or call your owne.

He then concluded with a special exhortation to the newly appointed judge.

The speech was worthy of the man and of the occasion. It was simple and direct, and there is a ring of sincerity in it that comes straight from the heart. It could not but have impressed the vast concourse of the different castes that met on that memorable occasion, and it must have appealed strongly, and in an equal degree, to the European and native inhabitants of the town and island of Bombay in reconciling them to a change which must have been distasteful to some but finally proved to be to the advantage of the whole community.

THE WORLD-WIDE WOMAN SUFFRAGE MOVEMENT.[1]

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It is the purpose of this article to present in concise and convenient form a chronological summary of the progress of the struggle of women for political equality throughout the world in the nineteenth and twentieth centuries. One who thus studies the world-wide suffrage movement chronologically cannot help being impressed with the steady persistence of the movement and its record of almost continuous achievement. In the period of nearly seventy years which has elapsed since the middle of the nineteenth century, there have been only fifteen years which have not been marked by some legislation, either conferring the suffrage on women or making them eligible to some public office not previously open to them; while in the forty-two years since 1877 there has been only one year (1905) without some such legislation.

Political concessions to women go back to an earlier date, and have been made in a much larger number of countries, or partially autonomous States and provinces, than is probably generally appreciated. The earliest grant of suffrage to women in the nineteenth century is apparently to be found in the English Poor Law of 1834. This Act provided that in the election of boards of guardians all owners of land and all rate-payers were entitled to vote, and to

[1] Some time ago the writer was surprised to find that no chronological summary of the suffrage movement, at once accurate, complete, and up-to-date, is readily available to students of comparative legislation. No little pains has been taken to make this present summary complete and accurate. One is frequently puzzled to find different dates assigned by different writers for the same legislative enactment. Not infrequently these discrepancies may be accounted for by the fact that one writer has taken the date when the Act passed the legislative body, and others have taken the date when the Act received executive approval or went into effect. The dates given in the body of the article are believed to be the correct or preferable ones.

cast from one to six votes, according to the amount of property which they owned or on which they paid rates as occupiers. Although not specifically mentioning women, the Act was so construed as to include them in this suffrage provision. In Ireland also, as early as 1837, women rate-payers seem to have been permitted to vote for Poor Law Guardian Boards.[1] The next earliest grant of suffrage to women occurred in the United States a year later (1838), when the State of Kenctucky granted to widows with children of school age, living in country districts, the right to vote for school officers.[2] Apparently these were the only suffrage concessions before 1850 or 1852.

Just how much progress was made in the period of the fifties it is difficult to state with any degree of confidence. There is some evidence (1) that the German Duchy of Brunswick in 1850 permitted unmarried women and widows to vote by male proxy ;[3] (2) that, in the Transvaal, women were given " municipal " suffrage in 1854 ;[4] (3) that, in 1856, Prussia granted the proxy vote to all women possessed of a specified property qualification ;[5] and that in Westphalia after 1856 all qualified women had some form of suffrage by male proxy.[6] In the case of the Swiss Canton of Berne, however, there is quite satisfactory evidence that a law passed in 1852 conferred the right to vote by proxy upon women who were communal taxpayers. Practically no advantage was taken of this grant, however, until about 1885, when, owing to peculiar political conditions, women seem to have made extensive use of proxies ; whereupon a reaction set in almost immediately, and shortly thereafter the suffrage law of 1852 was repealed.[7]

Bohemia, as early as 1862, granted the suffrage for members of the provincial Diet to women over thirty years of age who were tax-

[1] 4 & 5 William IV, c. 76 ; A. L. Lowell, *The Government of England*, vol. ii. p. 133 ; 1 & 2 Vict. c. 56 ; Florence B. Peterson in *Woman Citizen's Library*, vol. vii. p. 1835.

[2] Peterson, *op. cit.* p. 1787 ; Elizabeth Cady Stanton, *et al.*, *History of Woman Suffrage*, vol. i. p. 869 ; *Kentucky Revised Statutes* (1852), c. 88 ; *Kentucky Statutes* (1899), c. 113, s. 4434.

[3] Jessie J. Cassidy, *Legal Status of Women* (1897), p. 115 ; Peterson, *op. cit.* p. 1787.

[4] Peterson, *op. cit.* p. 1787.

[5] Cassidy, *op. cit.* p. 115.

[6] Cassidy, *op. cit.* p. 115 ; Stanton, *History of Woman Suffrage*, vol. iv. p. 1039.

[7] M. Ostrogorski, " Woman Suffrage in Local Self-Government," in *Political Science Quarterly*, vol. vi. p. 693, 1891 ; Cassidy, *op. cit.* p. 115.

payers or members of professions, and at the same time made them eligible for membership in the Diet.[1] The next year (1862), Austria granted proxy suffrage to unmarried women and widows with property, and Sweden granted municipal suffrage to tax-paying widows and spinsters, and also made them eligible to school and parochial boards, except in Stockholm.[2] In 1864 Bohemian women were given the communal franchise, except in Prague and Reichenberg.[3] A year later (1865), Finland made the first of a series of grants which were to culminate in full suffrage in 1906 : local suffrage was granted to tax-paying women in country districts.[4] The following year (1866) witnessed the extension of proxy suffrage to unmarried land-owners in Russia ; and in the Austrian provinces of Galicia, Lodomeria, and Cracow, women living with their husbands were permitted to vote by proxy by their husbands, and other women were given the right to select their proxies, and to instruct them how to cast their votes.[5] In 1867, Prussia extended to women property-owners of Schleswig-Holstein the privilege of voting by proxy, and New South Wales became the first of the Australasian States to grant municipal suffrage to women.[6] The State of Michigan, the same year, granted to tax-paying women the right to vote in school elections ;[7] and Nebraska, in the closing year of the decade (1869), also granted the school suffrage to women ; but six years later this Act was repealed except in so far as it referred to unmarried adult women and widows.[8] Victoria in 1869 followed the example of New South Wales two years previous ; while, in the United States, women received from the Wyoming Territorial legislature the first grant of full suffrage. Upon Wyoming's admission to the Union in 1890, this grant was embodied in the State Constitution, Wyoming thus became the first State, as well as the first Territory, in the

[1] Alice Zimmern, *Woman Suffrage in Many Lands*, p. 96 ; Carrie Chapman Catt, in *Woman Citizen's Library*, vol. vii. p. 1604 ; Peterson, *op. cit.* p. 1836.

[2] M. Ostrogorski, *op. cit.* ; Stanton, *op. cit.* vol. iv. p. 1040 ; Catt, *op. cit.* p. 1604.

[3] Peterson, *op. cit.* p. 1787.

[4] M. Ostrogorski, *op. cit.* ; Cassidy, *op. cit.* p. 114 ; the date given in the *Woman Suffrage Year Book* (1917) and in the *Woman Suffrage Blue Book* (1917) is 1863.

[5] *Woman Suffrage in Practice* (London, 1913), p. 73 ; Catt, *op. cit.* p. 1606 ; Cassidy, *op. cit.* p. 114.

[6] Stanton, *op. cit.* vol. iv. pp. 1031, 1039 ; E. A. Hecker, *A Short History of Woman's Rights*, pp. 146–7 ; *Woman Suffrage in Practice*, p. 19 ; Cassidy, *op. cit.* p. 115.

[7] Stanton, *op. cit.* vol. iv. p. 769.

[8] Stanton, *op. cit.* vol. iii. p. 625 ; vol. iv. p. 808.

Union to grant complete political equality to women.[1] In England also, the year 1869 was an important one in the history of the suffrage movement. English and Welsh widows and spinsters who were householders were given the municipal suffrage; and the next year (1870) they were given the right to vote for school boards and made eligible to membership therein.[2]

The suffrage gains of the seventies were more important than those of the sixties both in Europe and in the United States. In 1870, Prussia conceded proxy voting for members of the *Kreistage* to women property-holders;[3] Italy gave widows the right to vote by proxy in Parliamentary elections;[4] and the legislature of Utah Territory, doubtless influenced by the example of Wyoming Territory the preceding year, extended full suffrage to women. This law remained in effect until Congress in 1887 annulled it by the Edmunds-Tucker Act.[5] In 1871, West Australia extended municipal suffrage to women,[6] and a little later (1872) Scottish women were permitted to vote for school boards, and made eligible as members.[7] In 1873, Bohemian women were given the proxy vote for members of the Imperial Austrian Parliament;[8] Finland granted full suffrage to widows and divorced women and spinsters who paid taxes and resided in city districts;[9] and the Kingdom of Saxony granted to women property-owners the right to vote on the same terms as men, except that married women were to vote by proxy through their husbands, single women voting directly.[10] New Zealand, apparently somewhat influenced by the suffrage concessions already made in Australian States or in the United States, granted the school suffrage to women in 1877.[11]

[1] Stanton, *op. cit.* vol. iv. p. xxii.; *Wyoming Session Laws* (1890), c. 80, s. 7.

[2] 32 & 33 Vict. (1869), c. 53, s. 9, "Municipal Franchise Act." 33 & 34 Vict. (1870), c. 75, ss. 29, 31.

[3] Ostrogorski, *op. cit.* p. 698. Below is given a list of the other German States which had proxy voting for women before the World War, but I have been unable to ascertain the dates when the privilege was granted: Bavaria, Saxe-Meiningen, Reuss, Waldeck, Schwarzburg-Rudolstadt, Schwarzburg-Sonderhausen, Hanover, Bremen, Lubeck, Saxe-Altenburg, Lippen, and Hamburg.

[4] Stanton, *op. cit.* vol. iv. p. 1038.

[5] Stanton, *op. cit.* vol. iv. p. 951

[6] Hecker, *op. cit.*

[7] 35 & 36 Vict. c. 62, s. 12.

[8] Cassidy, *op. cit.*; Stanton, *op. cit.* vol. iv. p. 1039.

[9] Ostrogorski, *op. cit.*; Cassidy, *op. cit.*; the *Woman Suffrage Blue Book* and the *Woman Suffrage Year Book* (1917) give 1872 as the date for Finland.

[10] Stanton, *op. cit.* vol. iv. p. 1025.

[11] Stanton, *op. cit.* vol. iv. p. 1025.

The other political gains of the seventies occurred in the United States. California and Illinois in 1873 made women eligible to all school offices.[1] In 1875, Minnesota, by an amendment to her Constitution, authorised the legislature to give women the right to vote for school officers or upon any measure relating to schools, and to make them eligible for school offices. Three years later (1878), the legislature enacted the necessary Bills to make this grant effective.[2] In 1876, the women of Kansas also received the school suffrage.[3] The same year, Colorado was admitted into the Union, and her State Constitution contained a section authorising the legislature to extend the suffrage to women, subject to a popular referendum.[4] Two years later (1878), property-owning women in Oregon were given the vote for school trustees, and upon questions of raising funds and making appropriations for school purposes;[5] and, in New Hampshire, women were also given the school suffrage.[6] In the last year of the decade, the Territorial legislature of Dakota granted the school suffrage, but four years later (1883) this law was repealed except as to the fifteen oldest and most populous counties.[7]

The period of the eighties recorded the greatest activity in suffrage legislation of any decade up to that time, more than forty separate enactments occurring during this period, and most of them being found either in the British Empire or in the United States. In 1881 the English Parliament granted municipal suffrage to Scottish women,[8] and women property-owners in the Isle of Man were given full suffrage for the legislative body of that political atom.[9] Iceland, in 1882, gave municipal suffrage to widows and spinsters who were householders and self-supporting.[10] In the same

[1] Stanton, *op. cit.* vol. iv. p. 506, 607; *Revised Statutes of Illinois* (1908), c. 122, Art. 16, s. 290.

[2] Constitution of Minnesota, Art. 7, s. 8; Stanton, *op. cit.* vol. iii. p. 653; vol. iv. p. 778.

[3] *Laws of Kansas* (1876), c. 22; *General Statutes of Kansas* (1901), s. 6125; Stanton, *op. cit.* vol. iv. p. 659.

[4] Constitution of Colorado, Art. 7, s. 2; Stanton, *op. cit.* vol. iv. p. 528.

[5] Stanton, *op. cit.* vol. iv. p. 897.

[6] *New Hampshire Revised Statutes* (1901), c. 90, s. 9; Stanton, *op. cit.* vol. iii. p. 374.

[7] Stanton, *op. cit.* vol. iii. p. 663; vol. iv. p. 543.

[8] 44 & 45 Vict. c. 13, ss. 2–3.

[9] Eva McLaren, *Civil Rights of Women* (Pamphlet), p. 17; Stanton, *op. cit.* vol. iv. p. 1025.

[10] Ostrogorski, *op. cit.*; the year 1881 is sometimes given for Iceland.

year, women in police boroughs in Scotland were given the right to vote for and hold the office of commissioner ;[1] in Cape Colony, women property-owners and occupiers received the municipal franchise on the same terms as men ;[2] and in Burmah, tax-paying women were also given the municipal suffrage in Rangoon, the capital, on the same terms as men.[3] Hungary, in 1886, granted to women property-owners suffrage by proxy in communal elections.[4] In 1888, women in England and Wales were granted the county franchise, including the right to vote for members of the London County Council ;[5] and a year later (1889), Scottish women received the same concession.[6] In this closing year of the decade, Sweden made women eligible to municipal poor-relief committees and school boards in Stockholm, and Norway permitted all women who paid a school tax to vote on all school questions, while childless women who paid no tax were permitted to vote on all school questions, except those involving expenditure.[7]

More numerous than the European suffrage gains of this period were those in Australasia, Canada, and the United States. In 1880 the women of South Australia received municipal suffrage,[8] and four years later (1884) a similar grant occurred in Tasmania, and six years later in Queensland and New Zealand.[9] In Canada, between 1884 and 1888, nine provinces and districts made grants of local suffrage to women. Ontario and Quebec led off in 1884 by giving municipal suffrage to property-owning widows and spinsters, and in Ontario they were also made eligible to sit on school boards.[10] Two years thereafter (1886), New Brunswick followed Ontario's example, and even went further by giving women the county councils suffrage.[11] At the same time Nova Scotia gave municipal

[1] McLaren, *op. cit.*

[2] Peterson, *op. cit.* pp. 1787, 1846 ; Stanton, *op. cit.* vol. iv. p. 1041.

[3] Catt, *op. cit.* p. 1639 ; the year 1864 is sometimes given ; Peterson, *op. cit.* p. 1787.

[4] *Woman Suffrage in Practice*, p. 137.

[5] 51 & 52 Vict. (1888), c. 41. pt. 1, s. 2.

[6] 52 & 53 Vict. (1889), c. 50, pt. 1, s. 9, and pt. 4, s. 28.

[7] Cassidy, *op. cit.* p. 114 ; Catt, *op. cit.* p. 1627.

[8] Stanton, *op. cit.* vol. iv. p. 1027 ; Hecker, *op. cit.*

[9] *Woman Suffrage in Practice*, p. 25 ; Stanton, *op. cit.* vol. iv. pp. 1031–2 ; Hecker, *op. cit.* p. 146.

[10] Stanton, *op. cit.* vol. iii. p. 832 ; vol. iv. p. 1035 ; *Woman Suffrage in Practice*, p. 50 ; Cassidy, *op. cit.* ; the dates 1889 and 1892 are sometimes given for the Quebec grant.

[11] Stanton, *op. cit.* vol. iv. p. 1035 ; Peterson, *op. cit.* p. 1828

suffrage to all property-owning women, except those whose husbands were voters.[1] The year 1888 saw four other enactments: Prince Edward Island, British Columbia, Manitoba and the district of Alberta granted municipal suffrage to property-owning widows and spinsters; while Saskatchewan granted municipal suffrage to property-owning women generally. In Prince Edward Island women voters were also made eligible to municipal offices.[2]

In the eighties also, no less than fifteen States or Territories in the American Union enacted limited suffrage laws. In 1880, both New York and Vermont gave women the school suffrage and made them eligible to certain school offices.[3] Mississippi, the same year, adopted a suffrage law of a unique character: women freeholders or leaseholders were permitted to vote at county elections on the adoption or rejection of a law permitting stock to run at large; and also permitting a widow with children to vote on the disposal of "school lands," and for school officers.[4] In 1881, Massachusetts permitted certain limited classes of tax-paying women to vote for members of school committees on boards;[5] Indiana made women eligible to any school office;[6] and Michigan, which had given women tax-payers the school suffrage as early as 1867, now extended the privilege to non-taxpaying parents or guardians of children of school age; tax-paying women might also vote on bond issues and appropriations for school purposes.[7] Wisconsin, four years later (1885), gave women the right to vote for school officers and upon school questions.[8] The year 1887 was especially important in the history of suffrage legislation: New Jersey passed a law giving suffrage to women at school meetings in villages and country districts for school trustees, and upon bond issues and appropriations; but

[1] *Canadian Year Book* (1917), p. 20; *Woman Suffrage Blue Book* (1917), p. 103; the dates 1883 and 1887 are also given for Nova Scotia.

[2] Peterson, *op. cit.* vol. vi. p. 1828; Stanton, *op. cit.* vol. iv. p. 1035; *Woman Suffrage in Practice*, p. 50.

[3] Stanton, *op. cit.* vol. iii. pp. 394, 424; *Revised Statutes of New York*, vol. i. p. 573; *Laws of Vermont* (1880), Nos. 103, 104; *General Laws of Vermont* (1917), c. 52, s. 1188.

[4] Stanton, *op. cit.* vol. iv. p. 787.

[5] *Public Statutes of Massachusetts* (1881), c. 6, s. 3; Stanton, *op. cit.* vol. iv. p. 745.

[6] Stanton, *op. cit.* vol. iv. p. 623; *Revised Statutes of Indiana* (1881), s. 4540.

[7] Stanton, *op. cit.* vol. iv. p. 769; *Howell's Michigan Statutes*, vol. iv. s. 9883.

[8] Stanton, *op. cit.* vol. iv. p. 992; *Wisconsin Laws of* 1885, c. 211, s. 1; *Annotated Statutes* (1889), s. 428*a*.

seven years later (1894) the act was declared unconstitutional by the State Supreme Court.[1] The Arizona Territorial legislature declared that women who were parents or guardians of children of school age, or who had paid a Territorial or county school tax, should be eligible as school trustees and entitled to vote for those officers in any school district election.[2] The legislature of Dakota Territory widened the restricted school suffrage, so as to permit women to vote at all school elections, and for all school officers, and also made them eligible to all school offices.[3] Two years later (1889), when Dakota Territory was divided and North and South Dakota came into the Union as separate States, the State Constitution of each contained provisions on this subject of the school suffrage. That of South Dakota merely granted the right to vote at any election "held solely for school purposes," and made women eligible to any office not restricted to males by the terms of the Constitution. The clause in the North Dakota Constitution restricted their eligibility to school offices, and gave them the right to vote "upon all questions pertaining solely to school matters." Both Constitutions contained further provisions authorising or requiring the legislature to submit the question of a wider extension of the suffrage to popular referendum.[4] Montana, admitted as a State the same year (1889), also included in her State Constitution some advanced provisions for woman suffrage. Women were given the school suffrage, made eligible to the office of county superintendent of schools and to any school district office, and, furthermore, women tax-payers were given the right to vote upon "all questions submitted to the vote of the tax-payers of the State, or any political division thereof."[5] This was the first State-wide grant of suffrage on questions of taxation. Next in importance to the Montana constitutional clause just mentioned was the important suffrage victory won in Kansas (1887), where women were given not only the right to vote for school officials and on questions of issuing bonds for school purposes, but also were granted the right to vote

[1] Stanton, *op. cit.* vol. iv. pp. 830–1.

[2] Stanton, *op. cit.* vol. iv. p. 474; *Revised Statutes of Arizona Territory* (1901), s. 2176.

[3] Stanton, *op. cit.*; *North Dakota Laws of* 1890, c. 62, s. 5; *Revised Codes of North Dakota* (1905), s. 799.

[4] Stanton, *op. cit.* vol. iv. pp. 543, 550, 561; Constitution of North Dakota, Art. 5, ss. 122, 128; Constitution of South Dakota, Art. 7, ss. 2, 9.

[5] Constitution of Montana, Art. 9, ss. 10, 12; Stanton, *op. cit.* vol. iv. p. 799.

for municipal officials generally.[1] In 1888 Kentucky granted a slight extension of the school suffrage.[2]

In the decade of the nineties, suffrage enactments were less numerous than in the preceding period; nevertheless, they were in a number of instances of much greater importance than any which have been mentioned thus far. The great majority of these important enactments appeared in the United States, comparatively slight progress being made in these years in the Canadian provinces. British Columbia in 1891, and Prince Edward Island in 1899, gave women the school suffrage, British Columbia making them eligible to school offices, as did New Brunswick two years later (1893), Nova Scotia in 1895, and Prince Edward Island in 1899.[3]

In Australasia and Europe, likewise, there were only a few important suffrage gains in the nineties. New Zealand, in 1893, granted women the Parliamentary franchise after having, a short time previously, extended the municipal suffrage to the wives of rate-payers;[4] and South Australia in 1894, and West Australia in 1909, also gave women the Parliamentary franchise, the former making women eligible to the lower branch of the State legislature.[5]

Since 1891, women in Roumania have voted for school committees.[6] In France women won their first concessions in 1898: women engaged in commerce were given the right to vote for judges of the tribunals of commerce.[7] Almost a whole decade was to pass before French women won their next slight political concession. The Isle of Man in 1892 granted legislative suffrage to tax-paying women.[8] The remaining European suffrage extensions occurring during this period took place in the United Kingdom. In Scotland, women were given the vote for members of the parish council in 1894,[9] and the same year qualified women in England and Wales, married and unmarried, were permitted to vote for urban and rural

[1] *Laws of Kansas* (1887), c. 230; *General Statutes of Kansas* (1901), s. 642.

[2] Stanton, *op. cit.* vol. iv. p. 674; *Kentucky Statutes* (1899), ss. 4434, 4458.

[3] Peterson, *op. cit.* p. 1828.

[4] Peterson, *op. cit.* p. 1841; Stanton, *op. cit.* vol. iv. p. 1025.

[5] Stanton, *op. cit.* vol. iv. p. 1027; T. A. Coghlan, *The Seven Colonies of Australia* (1901–2), p. 116.

[6] Peterson, *op. cit.* p. 1840.

[7] Stanton, *op. cit.* vol. iv. p. 1040; sometimes 1894 is given as the date.

[8] Stanton, *op. cit.* vol. iv. p. 1055; Josephine Schain, *Women and the Franchise*, p. 75.

[9] 57 & 58 Vict. c. 58, pt. 2, s. 2; Peterson, *op. cit.* p. 1834.

district councils, and made eligible to those bodies.[1] Two years thereafter (1896), qualified unmarried women in Ireland were given the vote for guardians of the poor ;[2] and in 1898 they received the suffrage for county councils, town councils, and both urban and rural district councils.[3] Previous to this grant, women rate-payers in Ireland seem to have been permitted to vote for members of the Belfast Town Council by a local Act passed in 1887, and for the town councils of Blackrock and Kingston, also by local Acts, in 1894.[4] The last year of this decade (1899) brought to women the right to vote for London borough councils.[5]

In the United States, nearly a score of suffrage laws, including three Constitutional amendments, appeared in the nineties. Most of these were relatively unimportant grants of school suffrage, or extensions thereof, in Oklahoma Territory[6] and the newly-admitted State of Washington in 1890 ;[7] and in Illinois (1891),[8] New York (1892),[9] Connecticut[10] and New Hampshire (1893),[11] Ohio[12] and Kentucky (1894),[13] and Delaware (1898).[14] In 1898, Minnesota adopted a constitutional amendment permitting women to vote for library trustees, and making them eligible to membership on such boards.[15] Michigan also passed a law in 1893, similar to an earlier Kansas statute, which gave women the municipal suffrage. The Supreme Court of the State, however, the same year declared the Act

[1] 56 & 57 Vict. c. 73, pt. 1, s. 3 ; Peterson, *op. cit.* p. 1833.

[2] 59 & 60 Vict. c. 5, s. 1 ; Peterson, *op. cit.* p. 1835.

[3] 61 & 62 Vict. c. 2, s. 1 ; Peterson, *op. cit.* p. 1835.

[4] Peterson, *op. cit.* p. 1835.

[5] 62 & 63 Vict. c. 14, s. 2.

[6] Stanton, *op. cit.* vol. iv. p. 890 ; *Wilson's Revised and Annotated Statutes of Oklahoma* (1903), vol. ii. s. 6152.

[7] Stanton, *op. cit.* vol. iv. p. 928 ; *Laws of Washington*, 1890, p. 377 ; Ballinger's *Annotated Code and Statutes of Washington* (1897), vol. i. s. 2423.

[8] Stanton, *op. cit.* vol. iv. p. 604 ; Peterson, *op. cit.* p. 1788.

[9] Stanton, *op. cit.* vol. iv. p. 856 ; *Consolidated Laws of New York*, vol. i. c. 16, p. 602, s. 93.

[10] *Public Acts of Connecticut* (1918), c. 34, s. 373.

[11] *Laws of New Hampshire* (1893), p. 62.

[12] *Revised Statutes of Ohio, Annotated*, c. 7, s. 3970 ; Stanton, *op. cit.* vol. iv p. 882.

[13] Stanton, *op. cit.* vol. iv. p. 674. This Act was limited to second-class cities (Covington, Newport, and Lexington). It was repealed in 1902 because many coloured women voted in the spring election that year.

[14] Stanton, *op. cit.* vol. iv. p. 566 ; *Revised Statutes of Delaware* ; (1915), c. 71, s. 2285.

[15] Constitution of Minnesota, Art. 7, s. 8.

unconstitutional.[1] Iowa (1894) gave women the right to vote on bond issues not only for school, but also for municipal, purposes, at any city, town or school election, and also upon a question of increasing a tax levy.[2] Louisiana in 1898 authorised tax-paying women to vote in person or by proxy on all questions of taxation.[3] Severally, and even collectively, these suffrage gains were trivial in comparison with the constitutional amendments granting full suffrage to women at all elections, adopted by three of the Western States, Colorado in 1893,[4] Utah in 1895,[5] and Idaho in 1896.[6]

In the first decade of the present century there were about the same number of suffrage enactments as in the nineties, and almost exactly half of them appeared in European countries. In the United Kingdom, the suffrage disqualification of married women to vote for the London County Council was removed in 1900,[7] and a similar disqualification of Scottish women to vote for members of town councils was removed the same year.[8] In 1907, qualified Scottish women, married and unmarried, were made eligible for town and county councils,[9] and the same year, qualified English women were made eligible to the corresponding English offices, including the London borough and county councils.[10] With these enactments, women in the United Kingdom had been given the right to vote in practically all local elections, and were in most cases eligible to hold the offices for which they might vote. From that date the woman suffrage campaign in England was concentrated upon securing the full Parliamentary franchise.

In Holland, in 1901, women were given the right to vote for members of chambers of commerce, and made eligible to member-

[1] Stanton, *op. cit.* vol. iv. p. 769; *Michigan Public Acts* (1893), No. 138; Coffin *v.* Election Commissioners, 97 Mich. 189.

[2] *Laws of Iowa, 35th General Assembly*, c. 39; *Annotated Code of Iowa* (1917), s. 1131; Stanton, *op. cit.* vol. iv. pp. 635–6.

[3] Stanton, *op. cit.* vol. iv. p. 687; *Marr's Annotated Revised Statutes of Louisiana* (1915), vol. ii. s. 4401.

[4] Constitution of Colorado, Art. 7, s. 1. An admirable study of the practical operations of woman suffrage in Colorado is to be found in Helen Sumner's *Equal Suffrage* (1909).

[5] Constitution of Utah, Art. 4, s. 1.

[6] Constitution of Idaho, Art. 6, s. 2. *See also* Pearl Tyer's "Idaho's Twenty Years of Woman Suffrage," in *Outlook*, vol. cxiv. p. 35 (1916).

[7] 63 & 64 Vict. c. 29, s. 3.

[8] 63 Vict. c. 49, s. 23.

[9] 7 Ed. VII. c. 48, s. 1.

[10] 7 Ed. VII. c. 33.

ship.[1] Apparently about the same time, Dutch women secured the right to vote in the proceedings of dike associations if they were tax-payers, or if they owned property adjoining the dikes.[2] Finland, in 1906, as an outgrowth of opposition to Russian bureaucracy, and after an active campaign on the part of the women themselves, granted the full Parliamentary franchise and made women eligible to Parliament. From that year to the opening of the World War, from sixteen to twenty-five women have sat as Members of the Finnish Parliament at every session.[3] About the same time (1907), Russia granted proxy suffrage to married land-owning women.[4] In Italy (1907) and Belgium (1909), women were given the right to vote for members of councils of experts; and in Italy, women who are themselves engaged in trade also have the right to vote for members of the chambers of commerce.[5] In 1907, France gave women the right to vote for councils of experts, and the year following made them eligible as members, and gave to women merchants the vote for judges of commercial courts.[6]

The most important European suffrage gains of this decade occurred in the Scandinavian countries. Norway in 1901 granted municipal suffrage to tax-paying women, and made them eligible to serve on municipal councils.[7] Six years later (1907), full Parliamentary suffrage and eligibility to Parliament was bestowed on tax-paying women.[8] Iceland, in 1902, made women eligible to all offices for which they might vote at that time, and in 1909, both Iceland and Sweden granted women municipal suffrage on the same terms as men.[9] Denmark, in 1907, gave women the franchise and eligibility for poor-law guardian boards, and, a year later (1908), the municipal franchise and eligibility.[10]

[1] *Woman Suffrage in Practice*, p. 118.

[2] F. A. Ogg, *The Governments of Europe*, p. 527.

[3] *Woman Suffrage in Practice*, p. 54; G. H. Blakeslee, "Woman Suffrage in Finland," in *Outlook*, vol. lxxxiii. p. 37 (1907).

[4] Ostrogorski, *op. cit.* p. 703.

[5] *Woman Suffrage in Practice*, p. 128; *Woman Suffrage Year Book* (1917), p. 24; Peterson, *op. cit.* p. 1837.

[6] *Woman Suffrage in Practice*, p. 122; Law of March 27, 1907; Law of November 15, 1908; Law of February 19, 1908.

[7] Catt, *op. cit.* p. 1626; Stanton, *op. cit.* vol. iv. p. 1041.

[8] Catt, *op. cit.* p. 1628; Stanton, *op. cit.* vol. iv. p. 1041.

[9] Ida H. Harper, "Woman Suffrage Throughout the World," in *North American Review*, vol. clxxxvi. p. 55 (1907); *Woman Suffrage in Practice*, p. 83.

[10] Peterson, *op. cit.* pp. 1789, 1832; Catt. *op. cit.* p. 1609; *Woman Suffrage in Practice*, p. 78.

Of equal or greater importance were the suffrage extensions taking place in these years in the British Dominions. In 1909, Quebec slightly extended the suffrage by giving it to widows and spinsters who were householders;[1] but more important were the suffrage achievements in Australia, where, in the first year of the decade, West Australia granted full State suffrage to women (1900).[2] When the Australian Commonwealth was formed in 1901, women were given the national or Commonwealth Parliamentary suffrage and made eligible to both houses of the Commonwealth Parliament.[3] The year in which this grant became effective (1902), New South Wales gave women the State legislative franchise.[4] The next year Tasmania[5] did likewise, and in turn was followed by Queensland in 1905[6] and Victoria in 1908.[7] Of minor importance was the grant in 1903 in Transvaal of municipal suffrage to British women tax-payers or occupiers;[8] the grant of municipal suffrage to householders in Orange River Colony (1904), followed, in 1908, by a grant of school suffrage to parents of children attending public schools;[9] and the grant in Cape Colony in 1906 of the right to vote for school boards on the same basis as the municipal suffrage which had been granted as early as 1882.[10]

In the United States, the first years of this century brought comparatively few extensions of the suffrage. New York in 1901 granted to women tax-payers the right to vote on propositions to raise money by taxation or assessment;[11] and a similar grant was made to Kansas women in 1909.[12] The new State Constitution of Michigan in 1909 granted women tax-payers in cities and villages the right to vote on questions of acquiring and granting public

[1] *Woman Suffrage Blue Book* (1917), p. 101; *Canadian Year Book* (1917), p. 20.

[2] *Legislation of the Empire*, 1898–1907, vol. i. p. 177, No. 20, pt. 3; W. P. Reeves, *State Experiments in Australia and New Zealand*, vol. i. p. 112.

[3] *Australian Commonwealth Acts*, vol. i. pp. 354 ff.

[4] *Legislation of the Empire*, 1898–1907, vol. i. pp. 472 ff.

[5] *Legislation of the Empire*, 1898–1907, vol. i. p. 70, Act No. 17.

[6] *Legislation of the Empire*, 1898–1907, vol. i. pp. 532 ff. Act No. 1.

[7] Coghlan, *op. cit.* pp. 116 ff.: Peterson, *op. cit.* p. 1789; *Woman Suffrage in Practice*, vol. xiv.

[8] *Municipal Elections Ordinance*, No. 38 (1903); Peterson, *op. cit.* p. 1846.

[9] *Municipal Corporations Act*, No. 6 (1904); *Education Act*, 35 (1908); Peterson, *op. cit.* p. 1847.

[10] Peterson, *op. cit.* p. 1846.

[11] Stanton, *op. cit.* vol. iv. p. 869; *Laws of New York* (1901), c. 509, s. 2; *Revised Statutes of New York* (3rd ed., 1901), vol. iii. p. 3690.

[12] *General Statutes of Kansas* (1909), ss. 733, 1075, 1224.

utility franchises.[1] Oklahoma, by a provision in her first State Constitution (1907), granted women the school suffrage.[2]

From the very beginning of the decade in which we are now living, the suffrage movement has been characterised by renewed and widespread activity and victories of the first importance even before the World War began to make its influence felt upon the suffrage cause. In Norway (1910), municipal suffrage was extended to all women, whether tax-payers or not,[3] and in the same year several other minor suffrage grants occurred: Bosnia and Herzogovina were granted a new Constitution by Austria-Hungary which permitted widows and spinsters who were landowners to vote by proxy;[4] the Diet of the Austrian province of Krain granted municipal suffrage to the women of the capital city, Laibach;[5] the Austrian province of Voralberg gave the vote to single women and widows who paid taxes;[6] Würtemberg gave to women engaged in agriculture the vote for members of chambers of agriculture, and made them eligible as members;[7] the ruler of the principality of Baroda in India gave the women of his dominion the vote in municipal elections;[8] and in Natal, South Africa, women with children attending the Government school were given the vote for members of the school board.[9] In 1911, the women of Bélize, British Honduras, were given the right to vote for members of town councils,[10] and the women of Ireland were made eligible to membership in city and county councils;[11] in Switzerland, Geneva and Zürich gave women the vote for members of the Board of Trade, and made them eligible as members;[12] in Alberta, the municipal franchise was extended to all tax-paying women, whether married or single, and

[1] *Howell's Michigan Statutes*, vol. iv. s. 9883; Constitution of Michigan, Art. 8, s. 25.

[2] Constitution of Oklahoma, Art. 3, s. 3.

[3] F. A. Ogg, *The Governments of Europe*, p. 582; Catt, *op. cit.* pp. 1626–8.

[4] Catt, *op. cit.* p. 1605; Peterson, *op. cit.* p. 1790.

[5] Peterson, *op. cit.* p. 1790.

[6] Peterson, *op. cit.* p. 1790.

[7] Peterson, *op. cit.* p. 1790; Seymour and Frarey, *How the World Votes*, p. 32; *Woman Suffrage Year Book* (1917), p. 24.

[8] Peterson, *op. cit.* p. 1790.

[9] Peterson, *op. cit.* p. 1847.

[10] *Consolidated Laws of British Honduras* (1914), vol. ii. pt. 27, c. 84, ss. 25–6.

[11] 1 & 2 Geo. V. c. 35, s. 1.

[12] *Woman Suffrage in Practice*, p. 121; Ida H. Harper, "The World Movement for Woman Suffrage," in *Review of Reviews*, vol. xliv. p. 725 (1911).

they were declared eligible as members of school boards ; [1] at the same time, British Columbia extended the municipal suffrage to property-owning married women.[2] In 1912, the Diet of Lower Austria extended to women voters of Wiener-Neustadt and Waidhofen the direct vote in place of the proxy suffrage, and at the same time made voting compulsory.[3] In 1913, Norway granted full Parliamentary suffrage to women, being the first fully independent State to do this. Women were also made eligible to all offices, except the Council of State, to which they were not made eligible until 1916.[4] In 1914, municipal suffrage was conferred on women of the South African Union ; [5] and Santa Fé, a State in the Argentine Republic, granted full voting rights to women.

In the United States the woman suffrage cause has gained steadily and rapidly since the opening of the present decade. In 1910 New York granted tax-paying women a vote in town and village meetings, and in the smaller cities on bonding or taxing propositions ; [6] and the State of Washington became the first Pacific Coast State to grant complete suffrage to women by constitutional amendment,[7] to be followed a year later (1911) by California.[8] The next year (1912),[9] when the "Progressive" movement was at its height, Kentucky and New Mexico [10] granted full school suffrage to women, and newly-admitted Arizona,[11] quickly followed by Oregon [12] and Kansas,[13] adopted constitutional provisions giving women full suffrage rights. In 1913, the first Act passed by the first Alaska Territorial legislature granted women complete suffrage ; [14] and the State of Illinois went about as far in the same direction as possible without a constitutional amendment, and gave to women the right

[1] *Woman Suffrage Blue Book* (1917).
[2] *Ibid.*
[3] Catt, *op. cit.* p. 1605.
[4] Seymour and Frary, *op. cit.* vol. i. p. 188 ; Schain, *op. cit.* p. 76 ; *Woman Suffrage Year Book* (1917), p. 11.
[5] Catt, *op. cit.* p. 1638.
[6] *Consolidated Laws of New York* (1909), c. 64, s. 4 ; *Laws of New York* (1910), c. 135.
[7] Constitution of Washington, Art. 6, s. 1.
[8] Constitution of California, Art. 2, s. 1.
[9] *Acts of the General Assembly of Kentucky* (1912), c. 47, p. 193.
[10] *Laws of New Mexico* (1912), c. 57, s. 5.
[11] Constitution of Arizona, Art. 7, s. 2.
[12] Constitution of Oregon, Art. 2, s. 2.
[13] Constitution of Kansas, Art. 5, s. 1.
[14] *Session Laws of Alaska* (1913), c. 1.

to vote for practically all offices created by statute for which the Constitution did not expressly require male suffrage, and also for electors of President and Vice-president. Illinois women, however, do not enjoy the right to vote for Representatives and Senators in Congress nor for members of the State Legislature, the governor, or judges of the principal courts; but the grant of 1913 does apply to a few State, and a large number of country and municipal, officers.[1] In November 1914, after the beginning of the World War, although apparently quite uninfluenced thereby, Montana and Nevada adopted constitutional amendments giving women full suffrage.[2]

This brings our chronological summary of the suffrage movement down to the opening of the recent war. Prior to that, about a score of States, provinces or other political subdivisions had granted women the right to vote in certain elections by male proxies; twenty-two States, provinces or countries had given women complete suffrage; while in more than fifty other political units, of varying size and importance, and in all parts of the world, women had a limited direct vote in municipal or other strictly local elections.

It is of course too early to appraise the influence of the World War and woman's part therein upon the suffrage movement, but some indications of that influence are already clearly to be seen. One of the first effects of the war was to postpone until 1919 final action in Sweden upon a Government measure to give women the Parliamentary franchise which had passed the lower branch of Parliament before the opening of the war. This measure, enacted during the present year, conferred universal suffrage upon men and women regardless of taxability.[3] In Denmark and Iceland, on the other hand, the war may have hastened the passage, in Denmark, of a law giving full suffrage to all citizens of good repute and twenty-five years of age, and making women eligible to all offices;[4] and, in Iceland, of a law giving women complete suffrage.[5] In Holland, in 1916, a constitutional amendment was passed which authorised Parliament to extend complete suffrage to women, and to make

[1] *Laws of Illinois* (1913), p. 333; Hurd's *Revised Statutes of Illinois*, c. 46, ss. 546–7.
[2] Constitution of Montana, Art. 9, s. 2; Constitution of Nevada, Art. 2, s. 1.
[3] *The Suffragist*, vol. vii. 3 (January 18, 1919).
[4] Seymour and Frarey, *op. cit.* vol. i. p. 179; *The Woman Citizen* (N.S.), vol. i. p. 15 (June 2, 1917).
[5] Schain, *op. cit.* p. 76; *The Suffragist*, vol. vi. p. 3 (November 9, 1918).

them eligible to provincial councils, to Parliament, and to the Council of State. In 1917 Parliament enacted a law making women eligible to these offices, but did not grant them the Parliamentary suffrage until the present year (1919).[1] In 1916, Norway made women eligible to the National Council of State,[2] but a far more important gain of the same year occurred in Canada, and was largely due to the war. Full provincial suffrage was granted to the women of Manitoba, Saskatchewan, Alberta, and British Columbia, and the following year to the women of Ontario (1917).[3] The Dominion Parliament, in 1917, also conferred the Dominion Parliamentary franchise upon certain classes of women by the Military Voters Act, which gave the right to vote to every British subject, male or female, whether or not ordinarily resident in Canada, who had gone on active service in the Canadian naval or military forces, or had joined while in Canada the British aviation or motor-boat patrol service.[4] The War Time's Election Act, passed the same year, gave the Parliamentary franchise to every female who had the provincial qualifications required of males, and is the wife, widow, mother, sister or daughter of any person who served with the naval or military forces of Canada or Britain during the war.[5]

The greatest suffrage victory in the entire history of the movement came early in 1918 with the passage of the British Representation of the People's Act, which extended the Parliamentary franchise to about six million women of the United Kingdom.[6] Women, thirty years of age, are permitted to vote for Members of the English Parliament if they come within any of the following classes: (1) women who already enjoy the municipal suffrage; (2) women who are wives of men having the municipal franchise; (3) women who are graduates of a University; and (4) women engaged in Red Cross or similar work, or in nursing or other national service, either at

[1] *The Woman Citizen* (N.S.), vol. i. p. 26 (December 8, 1917); vol. iii. p. 786 (February 15, 1919); *International Year Book*, (1916), p. 827.

[2] *Woman Suffrage Year Book* (1917), p. 11.

[3] *The Woman Citizen* (N.S.), vol. i. p. 15 (June 2, 1917); *Woman Suffrage Blue Book* (1917), pp. 104 ff. The acts of Ontario, Manitoba and British Columbia carried also a vote for Members of the Dominion Parliament, but these features were disallowed by the Dominion authorities.

[4] 7 & 8 Geo. V. c. 34, pt. 4, ss. 2–3; *Acts of the Parliament of the Dominion of Canada* (1917), vol. i. c. 34, pp. 313 ff.

[5] 7 & 8 Geo. V. c. 39, ss. 32–3; *Acts of the Parliament of the Dominion of Canada* (1917), vol. i. c. 39, pp. 335 ff.

[6] 7 & 8 Geo. V. c. 64, pt. 1; J. R. Seager, *The Reform Act of* 1918 (London, 1918).

home or abroad, and who but for the war would have been qualified under this Act. This important reform Bill virtually closes one of the longest and most dramatic chapters in the history of the equal suffrage movement. To be placed on a footing of exact political equality with male voters, it only remains for British women to win a reduction in the age qualification, and the right to sit as Members of Parliament.

In the United States, the suffrage movement has both sustained serious defeats and won notable victories since the opening of the war; but the war has had much less to do with these gains than is true of European countries and Canada. In 1917 New York adopted a constitutional amendment giving women complete suffrage,[1] and the same year, Michigan, by statute, granted women the right to vote for Presidential electors, and the next year (1918) adopted a constitutional amendment completely enfranchising women.[2] South Dakota and Oklahoma also adopted complete suffrage by constitutional amendments the same year (1918).[3] The other suffrage gains in the United States reflect the difficulty, almost insurmountable in some instances, of amending State Constitutions so as to grant complete suffrage rights to women, and the influence of the Illinois device of 1913 in extending suffrage to women as far as is possible by valid statutory enactments. Arkansas (1917)[4] and Texas (1918) by statute gave the right to women to vote in primary election for the nomination of all candidates for public office. Inasmuch as one political party is overwhelmingly powerful in those States, the result of the primary of that party is equivalent to election, thus making the concession to women of more real value than might appear upon the surface. In Nebraska (1917), women were given the suffrage for officers and questions not specified or designated in the Constitution, except United States senators and representatives.[5] In Ohio (1917), the legislature gave women the suffrage and eligibility for Presidential electors and members of boards of education, but, upon a popular referendum, this law was defeated.[6] Indiana, the same year (1917), gave women the vote for

[1] Constitution of New York, Art. 2, s. 1.
[2] Constitution of Michigan, Art. 3, s. 1.
[3] Constitution of South Dakota, Art. 7, s. 1; Constitution of Oklahoma, Art. 3, s. 1.
[4] *Laws of Arkansas* (1917), Act 186.
[5] *Laws of Nebraska* (1917), c. 30.
[6] *Laws of Ohio* (1917), p. 566.

Presidential electors and statutory State officers, but the Supreme Court of that State soon declared the Act unconstitutional.[1] North Dakota (1917) granted the suffrage for Presidential electors and for statutory county and local officers.[2] Vermont (1917) gave her tax-paying women the right to vote in town meeting and municipal elections,[3] and Rhode Island the same year granted women the Presidential suffrage.[4] Iowa, Missouri, Minnesota, Wisconsin, Maine, and Tennessee are reported as also having given women the Presidential suffrage the present year.

Of far greater significance, however, has been the action of Congress this summer, when the Senate, by a very narrow margin, gave the necessary two-thirds vote in favour of a proposed amendment to the Federal Constitution which had repeatedly passed the House of Representatives by large majorities. This amendment, known as the Susan B. Anthony amendment, when ratified by the Legislatures of three-fourths of the States, will prohibit the States from making any discriminations in their suffrage requirements based upon sex, and will thus have the effect of establishing nation-wide woman suffrage in the United States. The certainty of the early ratification of this amendment by the requisite number of States is by no means assured at this time.[5]

In a word, since the opening of the World War in 1914, fifteen additional States, provinces, or countries, counting the United Kingdom as a single country, have conferred practically complete suffrage upon women, thereby bringing the total number of political units in which women have virtually achieved political equality with men up to nearly forty.

[1] *Acts of Indiana* (1917); *American Political Science Review*, vol. xii. p. 102 (1918).

[2] *Laws of North Dakota* (1917), c. 254.

[3] *Laws of Vermont* (1917), No. 98.

[4] *Public Laws of Rhode Island* (1917), c. 1507.

[5] See Carrie Chapman Catt, *Woman Suffrage by Federal Constitutional Amendment* (1917). Two minor suffrage gains in Mexico should perhaps be mentioned in order to complete this enumeration. The State of Yucatan, in 1916, granted full suffrage to women, and the State of Guanajuato (1917) granted the suffrage to women who can read and write and are self-supporting. Owing to the backward and disorganised conditions now prevailing in Mexico, neither of these grants is of much practical importance. *Woman Suffrage Blue Book* (1917), p. 109; Constitution of Yucatan, Arts 34–5.

THE NEW CODE OF ROMAN CANON LAW.

[*Contributed by* Rev. Reginald B. Fellows, M.A., LL.M.]

The Bull of promulgation by the present occupant of the Holy See, Pope Benedict XV, sets out the reasons for the recent codification of the Canon Law, and the procedure which was adopted by his predecessor, Pope Pius X, and himself in the preparation of the new Codex.

In his *motu proprio*, known technically as *Arduum sane*, of March 17, 1904, Pius X stated that, owing to various causes, the Canon Law no longer achieved its end with sufficient speed. For in the passing of centuries a great many laws were issued of which some were abrogated by the supreme authority of the Church, or fell into desuetude, while others proved too difficult to enforce, as times changed, or ceased to be useful to the common good. Moreover, the laws of the Church had so increased in number, and were so separated and scattered, that many of them were unknown, not only to the people generally, but even to the learned.

At the commencement of his pontificate, Pius X decided to gather together, and to digest with order and clearness, all the laws of the Church issued down to his own day, removing all that were abrogated or obsolete, adapting others as far as needful to the necessities and customs of the present time, and making new ones according as the need and opportunity should direct.

The Preparation of the Code.—The procedure adopted was as follows: (*a*) All the Archbishops of that part of the Catholic world to which the Code would apply were invited by the Cardinal Secretary of State to consult with their suffragan Bishops, and with the other Ordinaries who take part in Provincial Councils, and after such consultation to report to the Holy See what parts of the ecclesiastical law, in their opinion, stood in need of change or correction. (*b*) Experts in the Canon Law residing in Rome and in other places were called upon to collaborate in the undertaking under the guidance of Cardinal Gasparri. (*c*) A commission of cardinals was instituted to examine the proposed canons, and to change, correct, and perfect them as their judgment directed. The five cardinals originally commissioned all died before the completion of the work, and others were appointed to take their place. The cardinals under whose direction the Codex was finally drafted were

Cardinals Vincent Vannutelli, Cajetan De Lai, Sebastian Martinelli, Basil Pompili, Cajetan Bisleti, William Van Rossum, Philip Giustini, and Michael Lega. (*d*) Copies of the new Code, finished and corrected, were sent to all the Bishops of the Latin Rite in communion with the Holy See, and to all the Superiors of the Regular Orders, who are accustomed to be summoned to an Ecumenical Council, in order that they might make known their observations on the proposed canons.

The Code was finally acknowledged in all its parts, approved and ratified by the present Pontiff on the eve of Pentecost, 1917, by the Bull already referred to, in the following words: "Therefore, having invoked the aid of Divine grace, and relying upon the authority of the Blessed Apostles Peter and Paul, of our own accord, and with certain knowledge, and in the fullness of the Apostolic power with which we are invested, by this our Constitution, which we wish to be valid for all time, We promulgate, decree, and order that the present Code, just as it is compiled, shall have from this time forth the power of law for the Universal Church, and We confide it to your custody and vigilance (*i.e.*, to the custody and vigilance of the Episcopate and others addressed in the Bull). But in order that all concerned may be able to have a thorough knowledge of the regulations of the Code before they begin to be binding, We ordain that they shall not come into effect until Pentecost next year—*i.e.*, May 19, 1918."

The Object of the Code.—The work commenced during the Pontificate of Pius X, and completed during that of Benedict XV, had the following objects in view: (1) To set out clearly and in an orderly way the laws of the Church then in force, omitting those that would be recognised as abrogated or obsolete. (2) To amend or adapt existing laws in accordance with the necessities of the times. (3) To enact new laws in conformity with present needs.

The Meaning of Codification.—In jurisprudence two distinct meanings have been attached to the term "codification." The word sometimes means "the collection of pre-existing laws arranged and classified into a logical system, or one intended to be such without the interpolation of new matter"[1]—*i.e.*, codification consists merely in a logical arrangement and digest of existing laws. But sometimes by codification is understood "a declaration of the law composed partly of such materials as might be at hand from all sources—statutes, adjudications, customs—supplemented by such amendments, alterations, and additions as seemed to the law-givers to be required to constitute a complete system, and adapt it to the purpose of its adoption or promulgation." The Codification of the Canon Law is a codification in the latter sense. It consists not merely in the classification of existing laws, but in the introduction and promulgation of new and amending laws. If, as is

[1] Bouvier's *Law Dictionary*, vol. i. Title "Code."

sometimes affirmed, " the idea of a code involves that of the exercise of legislative power in its promulgation," the Codex under consideration is in the strict sense a Code.

Earlier Attempts at Codification.—Before the compilation of this Code—which is officially known as the *Codex juris canonici Pii X Pontificis maximi jussu digestus, Benedicti Papæ XV auctoritate promulgatus*—there had never been a complete codification of the Canon Law.

Collections of canons and decretals had been made by various persons during the first ten centuries of the Christian Era, but many false decretals composed by the compilers themselves appeared in these compilations. Among such collections should be named a collection known as *Continuatio ad Capitularia Regum Francorum*, the compilation, and to some extent also the composition, of a certain Benedict of Mayence in the ninth century. This collection contains genuine canons and decrees side by side with spurious ones prepared by the compiler. To that age also belongs the Pseudo-Isidorian Decretals, containing what purport to be fifty Apostolic canons, and many decretals purporting to have been issued by early Popes, but, like the Apostolic Canons, mostly the work of the compiler, with a number of conciliar decrees, many of which are unauthentic.

The Pseudo-Isidorian Decretals were followed by other collections, more or less spurious, compiled in France, Italy, and Germany. It is not necessary, for the purpose of this article, to treat of the collections in detail; it is sufficient to note their existence as attempts to provide what purported to be a collection of authoritative rules constituting the Canon Law. A really important collection, and of a very different character to the collections already referred to, was that which appeared in the twelfth century, the work of Gratian, a monk who lived and taught at the Monastery of SS. Felix and Nabor at Bologna. The compiler's object was to reconcile the inconsistencies among canons of different age and authorship dealing with the same subjects—he therefore named his compilation *Concordantia discordantium Canonum*, but the collection became known as the *Decretum Magistri Gratiani*, and was also cited as the *Codex, Corpus, Liber Decretorum*, or simply as *Corpus Juris Canonici*. Though a work of great importance, the *Decretum* never became an authoritative document. It was merely a scientifically arranged collection of documents, and so the fact that a particular document was found in the *Decretum* did not add anything to the authority of that document. Even this collection contained some of the forgeries included in the Pseudo-Isidorian Decretals to which reference has already been made.

The *Decretum Gratiani* became the first part of a long series of collections. The *Decretals* of Gregory IX, *Liber Sextus* of Boniface VIII, the *Constitutions* of Clement V, the *Extravagants* of John XXII, and the

Common Extravagants down to Sixtus IV (1471–84), each of them a large collection, added further matter.

These were known as *jus novum*; and, in contradistinction, the laws passed by the Council of Trent which came into force on May 1, 1564, and subsequent legislation, were known as *jus novissimum*. Much of the *jus novum* was obsolete, or had been so modified by later legislation that even when you had satisfied yourself that a decree in it was authentic, the chances are that it had been repealed, modified, or imposed again in a more complete form by the Council of Trent or later. As regards the *jus novissimum—i.e.*, the laws which came into force after the Council of Trent—these laws had not been collected into any Code, and anyone desirous of seeing the authentic sources had to go through the Acts of Councils, and the vast mass of the *Bullarium Romanum* and its continuations. "As a matter of fact, comparatively few turned to the *Bullarium Romanum* or to the *Acta et decreta* of Councils. The student purchased and used some good modern textbook of Canon Law. There were many such. But there was an inconvenience in this easy practice. No such textbook had any sort of authority beyond the reputation of its author. In these books what you found was merely what the author thought to be a true representation of the law at present." [1]

The New Code: Arrangement and Contents.—Now, however, the Law can be found in a single volume, easily accessible, well arranged, and authoritative. The Codex consists of 2,414 canons for the most part short and concise. The canons are numbered straight through, and can therefore be easily referred to and quoted by their number without reference to book, chapter, and title. The Code itself is divided into five books:

I. General Rules. II. Concerning Persons. III. Concerning Things. IV. Concerning Procedure in Ecclesiastical Courts, etc. V. Concerning Offences and Ecclesiastical Censures.

The matters dealt with under these headings are shortly as follows:

I. *Normæ Generales* (General Rules).—This book, comprising 86 canons, deals among other matters with the scope and force of ecclesiastical laws, the force and validity of custom, the definition of terms relating to time when they occur in the Code, rules relating to the interpretation of rescripts, privileges, and dispensations emanating directly or indirectly from the Holy See.

II. *De Personis* (Concerning Persons).—This book consists of 639 canons, and is divided into three parts, relating respectively to clerics, members of religious orders, and the laity.

[1] See *Decretalia Benedictina*, by Rev. Adrian Fortescue, D.D., in the *Table* newspaper, September 7, 1918. Much interesting and valuable information is to be found in this and two further articles which appeared in subsequent issues on the new Codex.

III. *De Rebus* (Concerning Things).—This book, comprising 826 canons, deals in detail with the seven sacraments—Baptism, Confirmation, Holy Eucharist, Penance, Extreme Unction, Holy Orders, Matrimony—laying down rules as to their administration, and upon whom the several sacraments can be conferred. The canons in this book also regulate the use of places of worship, and lay down rules as to preaching and catechising in parish churches; they deal also at considerable length with the formation and constitution of parishes.

IV. *De Processibus* (Concerning Processes).—This book, of 643 canons, deals (*a*) with ecclesiastical trials and appeals; (*b*) with the rules to be observed in preparing for what is known as the beatification of a deceased person and for the canonisation of a saint; (*c*) with special legal processes such as the procedure to be observed in an action to remove a parish priest.

V. *De Delictis et Pœnis* (Concerning Offences and Penalties).—This book, which completes the Codex, consists of 220 canons, and deals with the punishments which may be inflicted, such as excommunication, interdiction, and suspension for various breaches of the ecclesiastical law.

The Limitations of the Code.—A perusal of the new Codex shows that the canons deal in considerable detail with the matters to which they relate, and the Codex, as it purports to be, is a comprehensive statement of the law promulgated by the Holy See. It should be noted, however, that the Codex applies only to the Latin Church, and does not bind the Oriental Church except in matters which of their very nature concern also the latter (Canon 1); nor is it concerned in general with rites and ceremonies; consequently the liturgical laws laid down by the Congregation of Sacred Rites are to be observed unless in any special case any such law is expressly corrected by the Code (Canon 2).

Commentaries in Course of Publication.—Further details relating to the Codex would probably be of little interest to readers of this journal, but should any desire to pursue the matter further, they may be referred to such volumes as *The Canon Law in its Practical Aspects*, papers reprinted from *The Ecclesiastical Review*, 1917–18 (The Dolphin Press, Philadelphia, 1918), and *A Commentary on the New Canon Law*, by the Rev. P. Charles Augustine, O.S.B., D.D., Professor of Canon Law, (published by B. Herder Book Co., London and St. Louis, Mo., 1919). This commentary, which also contains the Latin text, will be completed in six volumes; of these, three have already been published.

A Latin commentary which can be recommended is being published in Rome in several volumes, and is entitled *Commentarium textus Codicis juris Canonici*. It is the work of a Dominican priest, Rev. Albert Blat, and is published by F. Ferrari at the Collegio Angelico, Rome. But the official text of the *Codex Juris Canonici* is published by the Vatican

Press at Rome in one volume. The volume contains an interesting preface by Cardinal Gasparri, and is provided with a very full index, the whole being, of course, in Latin.

THE EGYPTIAN DRAFT PENAL CODE, 1919.

[*Contributed by* G. Glover Alexander, Esq., LL.M.]

In 1914 the late Lord Kitchener appointed a Commission to consider the advisability of revising the Egyptian Codes, a complete revision of which was long overdue. That Commission made a report to the Foreign Office, in which the scope of the work to be undertaken was indicated; and accordingly, in December 1914, another Commission was appointed for the purpose of drafting a Penal Code "suitable to be applied to foreigners as well as natives in Egypt." This Commission has now completed its labours after four years of work during the Great War, and has recently issued a Draft Penal Code (*Projet de Code Pénal*), together with a Commentary thereon, explaining their reasons for such changes as they have thought fit to make.

The Commissioners justly say, in the Introduction to their Commentary:

> The Draft which we submit does not profess to be an original work. In these days, when almost every civilised country has a Penal Code, elaborated and revised from time to time to suit its special needs, but based upon those general principles which are common to all, it is evidently undesirable to attempt to strike out an entirely independent line. The duty of a compiler is rather to choose among the various systems those forms which appear to be most consonant with the general principles of justice and clearest in their expression, while always bearing in mind the special conditions of the country with which he is dealing. Moreover, as in the case of Egypt, when there is already a Code in existence with which the country is familiar, and which has been interpreted by the Courts, it is desirable to follow it as closely as possible.

The Commissioners continue: "Our main object, therefore, has been to correct errors, clear up obscurities, and fill up lacunæ in the Egyptian Native Penal Code," which was adapted from the French Code in 1883. "It has consequently been necessary," they add, "to make very considerable alterations as regards certain parts in order to bring them into harmony with modern ideas."

The Commissioners have taken the native, and not the mixed, Code as the basis of their work, as the latter is "still more antiquated and has

never been in general use." A large number of the reforms which the Commissioners propose have been taken from the Draft Penal Code prepared by Sir William Brunyate in 1913 for the International Zone of Tangier, for the very sufficient reason that

this Code was intended to apply in circumstances very analogous to those in Egypt when the capitulations are abolished, and it was specifically recommended as a basis for discussion by the Commission of 1914.

But they have "sought inspiration" from the Codes of many other countries. Amongst these the chief Code they have consulted is the Indian Penal Code, because, as they observe,

not only is that Code admittedly one possessing very high authority, but it was specially drafted for, and has for many years been successfully applied to, races that in character and habits closely resemble those inhabiting Egypt, and it has already been adopted in a modified form by the Sudan.

It is obvious that the Egyptian and Sudanese Codes ought to resemble each other as much as possible. Amongst the other Oriental Codes from which the Commissioners have taken suggestions are the Tunisian Code of 1913 and the Siamese Code of 1908, the latter of which they describe as

a very ably drafted work, combining principles taken from French, English and Italian sources, and intended to apply to conditions not dissimilar from those now existing in Egypt.

As to the Codes of the chief European countries, the Commissioners have borrowed a number of ideas and provisions from the Italian Penal Code of 1890, "the most modern and also the most carefully and scientifically drafted"; the Swiss Draft Code of 1918 which, in its earlier form, was used to a considerable extent in the drafting of the Tangier Code; the Dutch Code of 1881; and the Belgian Code of 1867. In addition they have introduced a few provisions which are almost if not entirely new, and are intended to deal with special conditions existing in Egypt and difficulties in the practice of the Courts in that country, "as suggested by the experience of members of the Commission."

In the opinion of the Commissioners,

although the proposed Draft retains the form and much of the substantive law of the French Code, from which the Egyptian Code was originally taken, the Commission considers that this law should be harmonised as much as

possible with the principles and spirit of the English Criminal Law, which is accepted throughout the British Empire.

This is a somewhat striking tribute to the excellence of this branch of our law. It supports the observation made by Sir F. Pollock in *The Genius of the Common Law* (p. 98): "There seems to be no doubt that English criminal jurisprudence has an attractiveness which goes beyond the merits of its particular rules and cannot be explained by merely juridical reasons." A practical reason is to be found in the fairness of most of the rules of English Criminal Law, including the Law of Evidence, and the spirit in which it is administered. "On the other hand," say the Commissioners,

in view of the long-continued French influence in Egypt and the nationality of the majority of foreigners in the country, we have endeavoured in general to avoid the introduction of English ideas which are in conflict with principles generally admitted on the Continent—for example, in such important matters as murder, adultery, offences committed by public servants, etc.

Although the English Law is not codified, the Commissioners have taken a number of provisions, especially relating to offences of a modern character, from the English Statutes, and they have utilised the well-known *Digest of the Criminal Law* drawn by Sir J. F. Stephen.

In the general arrangement of the Draft Code the Commissioners have followed that of the Tangier Draft, except that they have retained the existing division into four parts, viz., Part I—General Provisions; Part II—Offences of a Public Nature; Part III—Offences against Individuals; Part IV—Minor Offences (*contraventions*). The first part deals with preliminary matters such as the Application of the Code, Explanations and Definitions, Criminal Responsibility, Penalties, Principals and Accessories, Attempts, Recidivism, Juvenile Offenders, Publication, etc. Parts II and III deal with the general body of substantive criminal law, running very much on the same lines as the criminal law of most civilised countries, but the bulk is so great that it is impossible to follow it in its details. There are special provisions required by the conditions of the country. As, for example, Articles 452–3, dealing with the Removal of Landmarks, which is a subject of great importance in Egypt, where the annual overflowing of its banks by the River Nile tends to obliterate landmarks and boundaries of all descriptions.

The number of articles in the Draft Code has been increased considerably, but this is largely due to the fact that a number of long articles in the existing code containing two or more ideas or offences have been separated into their component parts.

Referring to the two languages in which the Code is printed, the

Commissioners say: "It is hoped that the two texts may be considered as mutually complementary, and that the French text may render clearer words or phrases which might appear obscure in the English." The admirable lucidity of the French language is well calculated to do this; but it is assumed that there will also be a translation into the vernacular Arabic, so that it cannot be said that the Code is not "understanded of the people" of Egypt, who are the parties most interested, as they are by far the larger number of persons who will have to live by and under this new Draft Code, if and when it is adopted and becomes law. At present we hear much of political and social unrest in Egypt; but no stronger proof of the benefit of the British Protectorate could be given, and no better evidence could be adduced of the desire of the ruling authorities to govern Egypt with justice, to promote law and order, and the true welfare both of the native Egyptians themselves and of foreigners, than the formulation and the contents of this Draft New Code.

A marked feature of the Draft Code is that it abolishes minimum penalties; and even in the case of capital offences, when death is at once the maximum and the minimum punishment, the Court may, "if it is of opinion that the circumstances are of such a nature as to merit leniency, substitute for the death penalty that of penal servitude for life or for a term" (Art. 43), with a proviso that the Court "shall in the judgment state the reasons why sentence of death was not passed" (*ibid.*)—instead of leaving the "prerogative of mercy" to be exercised by the Crown on the advice of an official, *e.g.*, the Home Secretary. We are not sure that this provision is altogether wise and the best. It may be an advantage to have all the circumstances reviewed by an independent mind, representing the executive and the public at large, with the assistance of the judge or judges who preside at the trial.

THE PENSION SYSTEM IN THE UNITED STATES.

[*Contributed by* His Honour Judge Parry.]

An important contribution[1] to Pensions history has been published under the auspices of the Carnegie Endowment for International Peace. It deals with the economical and historical aspect of War Pensions, and especially with the difficulties to sound administration that have arisen

[1] *Federal Military Pensions in the United States.* By William H. Glasson, Ph.D. Edited by David Kinley. Pp. xii. + 305. (New York: Oxford University Press, American Branch, 1918.)

in America owing to the sinister influences of politicians. Our own statesmen would do well to master the history of American War Pensions in order to avoid a repetition of mistakes that have led to grave trouble in the United States. As Professor Glasson points out in his preface, "the story is both heartening and depressing." Americans, he considers, may justly be proud of the generous impulses of their people in sacrifice and service in times of war, and depressed by the moral degeneration and political corruption that crept into the administration in times of peace. He might have added a word of warning about the negligence and indifference of the Bureaucracy, that did so much to justify the activities of the politicians in the eyes of the people.

We may be happy in the thought that the story begins, as all American history must begin, with a short account of the English pension system under Elizabeth. The early Colonial systems in Virginia and Massachusetts were borrowed largely from our Elizabethan laws, which dealt with pensions as a local rather than an imperial concern. The first Federal Pension law was passed by Congress during the progress of the Revolutionary War, on August 26, 1776, and from that time onwards America has had a national War Pension system. If, as has been said, history is philosophy teaching by experience, it is in the study of this history that we may find guidance in our own difficulties.

The complete transfer of pensions from State to national rolls took place gradually, but in 1789 the administration of national pension laws was taken over by the Secretary of War. In 1792 Congress attempted to impose upon the Circuit Courts the duties of examining and allowing pension claims, but stipulated that these judicial decisions should be subject to revision by the Secretary of War and Congress. The federal judges properly refused to accept such a position, or to admit that the legislature could possibly sit as a court of error on the judicial acts or opinions of the Circuit Courts. A constitutional controversy arose, and ultimately Congress yielded to the judiciary, who agreed on their part to take and transmit the evidence of claimants to the Secretary of War, but to make no decision upon the case. The details of this controversy are extremely important to us to-day, as our claimants to War Pensions have not only no legal right to their pension, but have no right to demand that the evidence on which their claims are based should be considered by anyone versed in the administration of justice. Indeed, at the present time a claimant to a pension in this country has no opportunity given him, at first instance, to have any hearing or determination of his claim before any definite authority, a situation that has caused, and is causing, much dissatisfaction.

In 1833 Congress appointed a Commissioner of Pensions to preside over a Bureau acting under the authority of the Secretary of War, and in 1849, on the establishment of the Department of the Interior, the Pension

Office became a bureau of that Department. It will be seen, therefore, that for nearly a hundred years there has been in existence an administration of War Pensions, similar in aims and objects to the Ministry which we have tardily set up during the turmoils of the recent war.

With the Civil War a new and enormous burden was thrown upon the Pension Bureau, and Professor Glasson's account of the contest between the departmentalists and the politicians is of the deepest interest. He is perhaps inclined to blame the politicians too much, and to lose sight of the fact that the fuel that created the fire was in the first instance the neglect of the authorities to make good the promises spread broadcast during the war. All pension histories tell the same tale. During the terrors of war, promises of pensions and rewards are made to our soldiers with lavish extravagance. After the war a cold fit descends on the survivors who are called upon to meet the bill. Bureaucracy, with its accustomed meanness, neglects just claims and exaggerates isolated stories of false pretences. Societies are formed to protect the soldier, and to guard his rights. Clever agitators and politicians make play with the subject for their own ends, and the general result is confusion, extravagance, and injustice.

Professor Glasson's account of the agitation of Mr. George E. Lemon, of *The National Tribune* and the Grand Army of the Republic, a powerful soldiers' defence league, shows the evil of such movements to the State and the pensioners. Probably the cure for these evils is to give every claimant a right to put forward his claim in open court in the same way as a workman injured by accident can pursue his claim to compensation. To-day a claimant for a pension is much in the same position as a workman would be who had to write to the insurance company and ask for compensation, and accept whatever amount they decided to give him without demur. Such a system will naturally lead, among Englishmen, to political agitation if it is not speedily altered.

It is to be regretted that Professor Glasson did not deal with the question of pensions and legal rights. In his Introduction he accepts the position that pensions are not matters of contract. This is the doctrine of to-day, and its evolution is of great legal interest. Harmon, in his *Manual of the Pension Laws*, 1867, quotes a Secretary of State in 1837 as laying down the rule that a pension Act, promising pension for future service, "amounts to a Contract on the part of the Government and vests an absolute right in the party whenever the disability shall occur." It would be interesting to trace the disappearance of this sound and valuable principle, and to know whether there is any American legal authority directly deciding that a pension is not a matter of legal right.

In the Appendix is a brief account of the War Insurance Law of October 1917, which is a radical departure from the existing pension

system, but applies only to service after this date.[1] It is a system providing for the support of men's families, and compensation for the disability or death of men, by an insurance the premiums of which are supplied by compulsory allotments of pay, supplemented by State assistance. It seems based on the principle that "a man fit for military service is physically a first-class risk," a proposition which has not obtained in this country with the Army Medical authorities responsible for enlistment.

An admirable index is attached to the book, and the volume itself will be of the greatest service to the growing number of citizens who are eager to understand what ought and can reasonably be done to redeem our promises to the soldiers and sailors who made such noble sacrifices in defence of our country.

[1] A fuller study of this legislation is contained in another volume in the same series: *Effects of the War upon Insurance, with Special Reference to the Substitution of Insurance for Pensions*. By William F. Gephart. (Oxford University Press. 7*s*. 6*d*.)

NOTES.

Annual Report.—During the year 1918 the work of the Society was carried on successfully though under conditions of exceptional difficulty. On the one hand the cost of printing and publishing had, for reasons with which we are all familiar, increased enormously. On the other hand the necessity for reducing administrative expenses to a minimum interfered with the collection of subscriptions, the result being that some of the Government subscriptions were not got in within the year. Notwithstanding these difficulties, the Society published two numbers of its *Journal*, of which one contained the usual annual review of the Legislation of the British Empire. The review of Foreign Legislation, which would necessarily have been imperfect, was temporarily suspended. The cost of publishing one of the two numbers was paid during the year. The payment for the other number was deferred until the following year, but it has since been duly made. The difficulty in consequence of the rise in the price of paper had been met by purchasing a stock before the price reached its highest level.

During the war the number of subscribers steadily increased ; a proof of the wide range of support which is now given to the Society.

The subscription from the Masters of the Bench of the Middle Temple enabled the Society to meet additional expense incurred on account of the removal to 1 Elm Court, Temple. The advantage of permanent headquarters in the Temple for the work of the Society is obvious, and convenient accommodation has been secured upon economical terms

Besides the subscriptions from the Dominions and Crown Colonies, the list of subscribers now includes foreign Government Departments and a large number of libraries in the United States. The number of private persons in all parts of the world who support the Society has also increased.

The arrangement under which the *Review of Legislation* is supplied only to subscribers has reduced the sales of separate copies of the *Journal* almost entirely to the back numbers. For these there is always a demand, and the Secretary will be glad to hear from those who have back numbers for which they no longer have any use.

The deepened sense of Imperial Unity has increased the recognition of the importance of the work done by the Society, and has stimulated

interest in the study of Comparative Legislation. The legislative experiments, constitutional and administrative, which are being tried in every part of the world afford ample and varied field for this study.

ABSTRACT OF RECEIPTS AND PAYMENTS FOR THE YEAR TO DECEMBER 31, 1918.

Receipts.	£	s.	d.	£	s.	d.
To Balance in hand at January 1, 1918				323	10	4
,, Amount of arrears collected in 1918				46	12	7
,, Amounts received for current year from :						
(*a*) Law Society	21	0	0			
Middle Temple	21	0	0			
Lincoln's Inn	21	0	0			
Gray's Inn	10	10	0			
(*b*) Government Subscriptions	35	14	0			
(*c*) Individual Subscriptions	208	5	0			
				317	9	0
,, Rent of Chambers Sub-let				18	10	0
,, Sales				17	5	1
,, Interest on War Loan				7	0	0
,, Subscriptions in advance				4	4	0
				£734	11	0

Payments.	£	s.	d.
By Publishing *No. XL.*	253	5	4
,, Editorial and Contributors' Fees	80	17	0
,, Rent of Chambers	58	15	0
,, Petty expenses, including stationery and postage	48	2	10
,, Clerical assistance	37	0	6
,, Furniture of Chambers	19	5	0
,, Purchase of back Numbers	5	5	0
,, Subscriptions in advance	4	4	0
Balance in hand at December 31, 1918	227	16	4
	£734	11	0

The Declaratory Judgment.—"The declaratory judgment," writes Mr. C. M. Knowles, "is an indication of an advanced state of civilisation in the society where it is found as part of the system of legal procedure, for, as Salmond has pointed out, the element of force as a means of securing obedience to its decrees has become merely latent in an orderly State, so that 'it is now for the most part sufficient for the State to declare the rights and duties of its subjects, without going beyond declaration to enforcement.' The advantages of a declaratory judgment which carries with it no coercive decree, which creates no new legal relationship, but which enables parties to ascertain their legal

relations so as to avoid future litigation, is evidenced by its adoption as part of the legal system of England, Scotland, Ireland, India, Canada, Australia, and New Zealand, as well as Germany and Austria.

"An exhaustive consideration of the declaratory judgment in all its aspects, first published by Professor Borchard in the *Yale Law Journal*, and now reprinted as a pamphlet of seventy-eight pages, leads the learned author to commend it to his own country as a reform worthy of speedy adoption.

"Professor Borchard finds the origin of the declaratory judgment in the *præjudicium* of Roman Law. Then he shows that, 'while the institution has fallen into disuse in modern France, it was from the France of the fourteenth and fifteenth centuries, with contributions from ecclesiastical law, that it found its way into Scotland, where it has developed and flourished, and whence, in 1852, it worked its way into English practice.' The Chancery Procedure Act, 1852, made it possible for English Courts to make declarations of right without granting consequential relief. Finally, the author arrives at o. 25 r. 5 of the Supreme Court Rules of 1883, under which there can be a declaratory judgment whether any consequential relief is or could be claimed or not.

"In the United States, desultory applications of the principle are traceable, mainly in reference to the construction of written instruments and the determination of conflicting titles to real property, but this form of procedure has not yet been adopted there *eo nomine*. Accordingly, while 'in England and some other countries, in order to obtain a judicial construction of a contract, it is unnecessary to resort to the crudity of breaking it,' yet in the United States they are still driven to this extreme. Professor Borchard shows how, for want of some such procedure, 'it was nearly twenty years after its enactment before the business world was able to learn authoritatively what the Sherman Law actually meant.' Meanwhile, large organisations 'stumbled along carrying enormous responsibilities in the hope that the law had not been violated, until the Department of Justice got ready to try a few test cases.'

"Professor Borchard concludes an extremely able article by suggesting that the United States should adopt an amended procedure under which

> the court shall have power in any action or in an independent or interlocutory proceeding, to declare rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed; and such declaration shall have the force of a final judgment."

Nobel Prize.—*The Norwegian Nobel Institute* offers a prize of 5,000 Norwegian crowns for an essay giving *An Account of the History of the Free Trade Movement in the Nineteenth Century, and its Bearings*

on the International Peace Movement. The essay may be written in English, French, or German, or in one of the Scandinavian languages. The prize essay will become the property of the Norwegian Nobel Institute. The essays, bearing an epigraph and accompanied with a sealed envelope containing the name of the author, must be sent in to the Norwegian Nobel Institute, 19, Drammensvei, Christiania, before July 1, 1922.

Norwegian Illegitimacy Laws.—The first of a legal series of pamphlets published under the direction of the Children's Bureau of the United States Department of Labour contains the Norwegian laws concerning illegitimate children, which formed the subject of an article by the President of the Odelsting in vol. xvi. of the Society's Journal (July 1916). Miss Lathrop, the chief of the Bureau, remarks that " these laws are notable as the first complete national recognition of the inherent right of the child to nurture, protection, and education, irrespective of his parentage, and of the State's responsibility for ascertaining parentage and for holding both parents equally and continuously responsible for the illegitimate child."

Moratory Legislation in Reference to Bills of Exchange.—Mr. C. M. Knowles writes: " Emergency legislation granting an extension of time for the payment of bills of exchange and notes has taken a variety of forms. In England, re-acceptance of a bill postponed the ' due date.' In Austria the time for payment was postponed. France, as in 1870–1, began by extending the time for all acts necessary for the preservation of recourse and later postponed the date of maturity, and Germany took the same course. Italy postponed maturity. Switzerland instituted a period of thirty days' grace. Whatever its form, moratory legislation is bound to provide students of the conflict of laws with an abundance of difficult questions for solution. In ' Moratory Legislation relating to Bills and Notes and the Conflict of Laws,' reprinted from the *Yale Law Journal*, Professor Lorenzen sets out to solve the problem whether such legislation relating to bills and notes payable in the various countries is effective with respect to persons who became parties to such instruments in the United States. In most countries the French moratory legislation of 1870–1 was upheld even as regards indorsers in the place where the suit arose, but in the literature on the subject a distinction is drawn between legislation which merely extends the time for protesting, and that which postpones maturity. Professor Lorenzen can see no reasonable basis for such a distinction in regard to questions arising under recent moratory legislation. His attitude is that such legislation ' enacted by the law of the place where a bill or note is payable can and should be recognised without reference to the

form in which it is expressed, as regards all parties to the instrument, including local drawers and indorsers.' On the other hand, 'moratory legislation enacted by the law of the place where the contract is entered into should not be regarded as binding.'"

Unification of Commercial Laws of the Empire.—The Committee desire to direct attention to the following letter from the Secretary of the British Imperial Council of Commerce:

"I beg to inform you that at a special Business Conference of my Council held on June 4, the following resolution was adopted:

"That considerable economies in time and expense would be accomplished if various laws of the Empire were unified, especially in regard to:

"(*a*) The constitution and registration of firms and companies.
"(*b*) Liquidation and winding up of Companies.
"(*c*) Bankruptcy of private firms.
"(*d*) Merchandise marks.
"(*e*) Patents, trade marks, and designs.
"(*f*) Copyright.
"(*g*) The description and labelling of foodstuffs and drugs.

And that representations be addressed to H.M. Government, and the Governments of Dominions, urging that the subject of the unification of commercial laws be considered by the Imperial Conference."

Law and Eugenics.—In dealing with the relation of eugenics to other sciences in the July number of the *Eugenics Review*, Dr. Laughlin, of the United States Eugenics Records Offices, has the following observations:

> While the relation between law and politics, on the one hand, and eugenics on the other, is largely the service which eugenics expects from legal procedure, still in turn a service will be rendered to the legal and political systems of the country by a eugenical ideal well established. In the field of criminal law, for instance, the analysis of personality which eugenical pedigree-studies present will give the law a new viewpoint for governing its treatment of criminals, especially so far as placing blame and responsibility and in attempting social salvage are concerned. In the political field eugenics may be expected to develop a higher idea for the patriotic outlook of the nation. As a rule, a nation feels a general sentimental solicitude for the unborn generations, but when a people learn that they can so attack the problems of human reproduction that the future generations, so far as their innate traits are concerned, will be improvements over the present, a higher and finer sentiment will animate our political philosophy.
>
> An ideal once established in a nation affects activities along many lines. The Eugenics Record Office often receives letters from persons who ask for the outline for a "model eugenic law." We must understand that the eugenical ideal cannot be wrought by a single so-called "eugenical statute," but that it will affect legislation in many fields. Indeed, it will be hard

to conceive of any important national or state legislation as having been duly considered unless, no matter what the particular subject may be, its eugenical bearing be duly weighed. For instance, a law which relates to taxes and renders treatment differential between parenthood and sterility has its eugenical bearing. By the birth- and death-registration laws data on differential fecundity and survival are provided. In laws governing marriage and divorce the eugenical principle is more directly concerned. In laws having for their purpose permanent commitment of the socially inadequate to custodial institutions, or their sexual sterilisation, if at large, are perhaps the most intimately eugenical subjects for legislation. It is thus probable that ultimately we may expect in all States, not a "eugenic law," whatever this may mean, but a eugenical code, comparable in its far-reaching activities, for example, to the body of sanitary laws.

The Rights of a Belligerent in Occupied Territory.—The judgment of the Rotterdam Court referred to in the Review of Dutch Legislation (*Review of Legislation*, 1917, p. 189), holding the German Government liable by default in damages to the owner of a Dutch ship sunk by the German military authorities in Belgian waters, may be open to the criticism passed on it in the Dutch Parliament by the representative of the Foreign Office, as contrary to International Law. The German action may be justified as an exercise of the *jus angariæ*, the right of a belligerent Power occupying the territory of its adversary to appropriate neutral property found within the area of operations for its own purposes, subject, of course, to compensation; and there is a precedent for it in the action by the German military commander, in the Franco-German War of 1871, sinking English ships in the Seine near Rouen in order to protect themselves from a French attack by water. The present war has seen the extension of this right to neutral property even outside the territorial waters of the State which is being occupied by its adversary: and a municipal Court is travelling outside its sphere by adjudicating upon such an action of a Sovereign State. In the case of Belgium, moreover, occupation, however wrongful, had lasted long enough for a regular system of legislation to be established, and this had never been protested against by the Dutch Government, so that Dutch subjects were hardly in a position to raise the question of the German Government's liability towards them. Apart from international law, by our municipal law a foreign Sovereign is also exempt from the jurisdiction of the Court, except in so far as it submits to it by taking action in them itself. In this connection reference may be made to a recent decision of the Council of State in France,[1] which held itself incompetent to hear a claim for damages against the French Government for the detention of an English ship carrying a cargo of oats which was consigned "to order"—the consignee was afterwards found to be the

[1] *Times*, May 7, 1919.

Italian Government—on the ground that the case arose from the exercise by the French Government of its power to take such police measures during hostilities with regard to neutral vessels as it judged expedient in the national interest.

Rivista Italiana di Sociologia.—The *Rivista Italiana di Sociologia*, which recently suffered a great loss in the death of Guido Cavaglieri, its director and one of the most energetic of its founders, is not primarily a legal periodical, but it often contains contributions of great value to the scientific study of law. The 1918 volume has made its appearance under a new Board of Directors, and two articles in it—one by V. Miceli explaining the relation between law and the life of the community, and the apparent contrast between the rigidity of legal formulæ and the flexibility of social conditions, and the other by Widar Cesarini-Sforza discussing the meaning of legal science, its right to be regarded as an experimental science, and the conditions necessary for its development merit the attention of students of jurisprudence. The volume also contains critical reviews of some of the more important legal books lately published, and a useful bibliography.

International Intermediary Institute. — The first two Bulletins[1] published by the newly-founded *Institut Intermediare International* give promise of making a useful addition to the library of International Law. The Institute is a body founded in January, 1918, under the law of the Netherlands, maintained by Dutch capital and directed by Dutch administration, and it offers its services to the juridical world as a central organisation for transmitting between different countries all information of international interest—a clearing-house, in fact, for International jurisprudence and practice, which will supply to individuals the text of recent treaties not published elsewhere, judicial decisions on questions of International Law, especially Prize Law, and will also give answers to specific inquiries by jurists as to the law of foreign countries. The statutes of the Foundation embrace in the scope of its functions the collection of all facts which have an international bearing on political, legal, economic, statistical, or commercial matters; and the list of founders, donors, and members includes the names of men of the highest political, legal, and business standing in the Netherlands.

The contents of these opening volumes are remarkable for their comprehensive character. The place of honour is fittingly assigned to a collection, in chronological order, of the official and semi-official documents, political and diplomatic, which form part of the process of transition from the late war to a condition of Peace, beginning with President Wilson's famous Fourteen Points (January 21, 1918), with his supple-

[1] *Bulletin de l'Institut Intermediare International.* Nos. 1 and 2, 272 and 150 pp. (Haarlem and The Hague, January and July, 1919.)

mentary statement (February 12, 1918) and his additional Declaration (Sept. 27, 1918).

This is followed by a succinct digest of decisions on International Law questions given by the various National Courts in 1918—taken from the current reviews and publications, such as Maître Clunet's *Journal de Droit International*, the English Reports and *International Law Notes*, and German, Belgian, Swiss, and Dutch periodicals. Nearly four hundred cases, which cover the whole field of Private International Law, are thus noted. The subject of Double Taxation is treated in an article on the Dutch law on the subject, and is to be followed by one on the Swiss law. There is also a summary of the International contractual obligations lately entered into, or terminated; of commercial treaties, agreements as to the provisioning of countries—*e.g.*, between the United States and Finland and Switzerland; documents relating to Zionism and the war; the answers to inquiries made of the Foundation by jurists on questions of prize law; and there is even a list of subjects connected with the war, on which the Society has collected newspaper cuttings for the benefit of inquirers. The present Secretary to the administrative Council—Dr. C. L. Torley Duwel—is to be congratulated on the quality of these first publications, and the progress of the Society will be watched with interest.

Marriage by Proxy.—Among the interesting revivals of old ideas and institutions due to the war there must be included the ancient marriage ceremony by proxy, based on the Roman Law principle of *consensus non concubitus facit*, which was the subject of considerable controversy among the Canonists, and formed part of the old law of France and, it has been contended, of the English common law. In an excellent article in the *Harvard Law Review* for March 1919, Mr. Ernest G. Lorenzen traces the history of the subject, what were the various criteria of what should constitute the "consent," the *sponsalia de præsenti* and *sponsalia per verba de futuro*, the effect or want of cohabitation to supplement the betrothal, up to the formulation adopted at the Council of Trent, that the consent must be exchanged before a priest and two witnesses: and he points out that this last did not definitely exclude the contract by proxy, and that in England, till the Marriage Act, it was still available, and in France there is still room for doubt, although the intention of the Code Napoleon to eliminate it is recognised. Under modern legislation in Continental countries, the civil form of marriage has become the regular one, and implies that the actual parties are present. This would be so for France and Belgium; in Italy it is definitely forbidden except for the Royal Family, and it was so in Germany: in Austria it is valid with the consent of the authorities. The war legislation of France and Italy has admitted it for sailors and soldiers on active service, and that of Belgium for all. The

author is of opinion that the English common law, as interpreted in the United States, still admits it, as compatible with the conditions of life in the new continent when settled (and not subject to the interpretation laid down in *R.* v. *Millis* by the House of Lords for English common law) : and he answers the question, whether American soldiers serving abroad can take advantage of it, in the affirmative, and holds that this should be recognised in Private International Law if compatible with the usual condition that the *lex loci contractus* is to govern, and marriages by such American soldiers by proxy in an allied State recognising the principle would be valid.

The Transactions of the Grotius Society.—"In the fourth volume of the Transactions of the Grotius Society especially noticeable," writes Mr. C. M. Picciotto, "is Lord Parmoor's address on a League of Nations, in which he appears as a warm supporter of the principle. Sir Francis Piggott's paper on the construction of certain sections of the British Nationality Act of 1914 deals, with lucidity and power, with a serious difficulty of interpretation. Dr. Bisschop has a learned and exhaustive paper on the German Legislation in Belgium. Mr. G. G. Phillimore contributes an admirable address on the Future Law of Neutrality. His view is that 'return to the *status quo ante* is as impossible in the juridical relation of nations as in their political relations.' Mr. Phillimore considers that the line of development will be along the Declaration of London as a basis for future extension of the principles of the law of neutrality. Judge Atherley-Jones, in his paper on the Treaty-making Power of the Crown, urges that the Constitution of this country should be brought into line with those of other democratic States, and the ratification of Parliament substituted for that of the Executive. In his 'Some European Leagues of Peace,' Dr. Evans Darby gives an excellent account of the historical schemes for the avoidance of war and the furtherance of international organisation."

NOTICES OF BOOKS.

THE TEACHING OF COMPARATIVE LAW.[1]

ONE of the results of the Great War will be a change in the orientation of students. The students who, before the war, used to resort to German Universities from other parts of Europe and from America, in search of the kind of scientific teaching which they could not find elsewhere, will, for a time at least, find themselves compelled to desert these haunts of learning. American students in particular will find their European sojournings diverted from German to British and French Universities. How can their needs be adequately supplied ? That is the question which is exercising the minds of University authorities on both sides of the Channel. And that is the question for which M. Lambert endeavours to supply an answer with reference to the study of law, especially in its comparative aspect. It is a question which does not brook delay, for symptoms are already apparent of a numerous and welcome flock of students from across the Atlantic in search of new quarters for their studies.

M. Lambert's contribution to the Annals of the University of Lyons shows, as might be expected from its author, wide reading and great learning, and, being well arranged and expressed, is eminently readable. By the help of Maitland and Pollock, and other well-known English authors, he traces the intimate connection between the history and development of English and of French law, especially during the period of the Year Books, the period during which French was in England the language of the law courts and of authoritative textbooks on law. He is familiar with the legal literature of the United States, such as the law journals and periodical papers brought out by the Harvard and other Universities, and by associations of lawyers like the American Bar Association, and he has made much use of the Select Essays in American legal history, which were published in 1907–9. Aided from these sources, he traces the influence exercised on the development of American law by conceptions derived from European, and in particular from

[1] *L'Enseignement du Droit Comparé. Sa co-opération au rapprochement entre la jurisprudence Française et la jurisprudence Anglo-Americaine.* Par M. Édouard Lambert, Professeur à la Faculté de droit de l'Université de Lyon. (Lyon : A. Rey ; Paris : Librairie A. Rousseau, 1919.)

French, sources, as illustrated by the rulings of great judges like Marshall, by the authoritative works of Kent, Story, and others, and by the impetus which Livingston gave to codification on French lines.

The comparative study of legislation is only a small branch of the comparative study of law, which M. Lambert has taken as his field, and he reminds us usefully that the study and comparison of legislative enactments can only be superficial and barren without knowledge of the history and development of the laws, customs, and usages which those enactments presuppose, and on which they are based.

M. Lambert writes as the representative of a commission or committee appointed by the Faculty of Law at the University of Lyons to consider the possibility of creating an Institute of Comparative Law at that University, and he pleads eloquently for such an Institute. The chief difficulty here, as elsewhere, is money. For effective teaching of law two things are essential: good teachers, and an adequate supply of books for the use of students. In both these resources the University of Lyons has been terribly crippled by the war. Its teachers have gone; its libraries (never, we gather, very well stocked) need to be replenished and brought up to date.

With M. Lambert's pamphlet may be usefully read the address delivered last December by M. Lévy-Ullmann to the French Société de Legislation Comparée, and published in the monthly Bulletin of that Society for January—March, 1919. M. Lévy-Ullmann points out the difficulties experienced by French lawyers and legal students in mastering the technicalities and complexities of English and Anglo-American Law, and asks our Society to co-operate with his in removing or lessening those difficulties. It is a request with which we would gladly comply so far as the means at our disposal enable us to do so. What is badly and urgently needed is some machinery for helping visitors to our shores from France, the United States, and other countries, for purposes of study, to profit by the lectures and forms of teaching bearing upon those studies, and by the materials required for those purposes. It is understood that, under the auspices of Mr. Herbert Fisher, who was himself in his younger days a student at Paris, the Board of Education has taken steps in this direction, and we hope and confidently expect that the Universities and libraries concerned will assist in carrying out this work.

C. P. I.

LAW OF CONTRACT DURING AND AFTER WAR.

It is unnecessary on the appearance of the third edition of Mr. Trotter's work,[1] to review the same in detail. The subject of contracts, always an important one in peace-time, has assumed a vastly increased importance during the war. The United Kingdom has long been one of the leading industrial and trading countries, and the British Empire is the source of many of the world's essential raw materials. At the outbreak of war there existed an unprecedented number of contracts between British subjects on the one hand, and neutrals and alien enemies on the other. The effect of war legislation upon these contractual relations has been great and far-reaching. Now that the war is about to be succeeded by a return to peace conditions, it becomes more than ever necessary, not only to know the effect of war legislation on contractual relations, but also to know what will be the effect of the declaration of peace on those relations, as regards those contracts which have been suspended in their operation, but not dissolved.

At the outset a difference may be noted between the British and German conception of the effect of war upon contractual obligations. It has never been the object of the British Legislation nor the policy of the British Courts to regard war in itself as a legitimate reason for confiscating private property belonging to the enemy; on the other hand, the conception, as set forth by Professor Joseph Kohler and some other German jurists, that war should be considered as affecting only States as such, but not the private property and legal relations between the citizens or subjects of belligerent States, has not found favour in this country. The necessary prohibition of trade and of communication with the enemy necessarily affects contractual relations during war, and must react upon their resumption or continuance when peace is finally re-established.

Part I of this work, giving a "Statement of the Law," has been revised, and a greatly enlarged statement of the whole law has been brought up to date, special emphasis having been laid on questions likely to arise after the conclusion of peace. The doctrine of "implied terms" in contracts has been given very full consideration. An especially welcome feature is the inclusion of references to Foreign Law bearing on the same subject, in regard to which the author expresses the modest hope that it may constitute a contribution, however small, to the comparative jurisprudence on this subject. In this respect the work may be regarded as a valuable companion volume to Dr. Huberich's *Trading with the Enemy*, which presents the American Law and decisions dealing with the same subject. In fact, the modern development of English and American Law on this subject is in many respects so similar that

[1] *The Law of Contract During and After War.* By William Finlayson Trotter. Third Edition. (Edinburgh: William Hodge & Co., 1919.)

no work purporting to deal with it would be complete without some reciprocal account of war legislation and decisions of the Courts in the other country. It is perhaps not quite justifiable to include an account of the legislation, and decisions of the British Dominions under the heading of "Foreign Law," since the relationship between the British Dominions and the Mother Country in legal matters stand upon a different footing.

Attention may be called to the Legal Proceedings Against Enemies Act, 1915, dealt with on p. 108, as a matter of some interest from the point of view of comparative jurisprudence. The Act in question has been regarded in some quarters as an anomaly in English jurisprudence. In *Stevenson* v. *Actien-Gesellschaft für Cartonagen, etc.*, Atkin J. observed that he thought it difficult to understand the principle underlying this legislation. The author ventures the suggestion that this Act represents an advance half-way to the American practice of publication of notice, and the Scottish practice of edictal citation, by which the Courts in these countries cannot only declare the rights of the parties, but also enforce them against an alien enemy's property within the jurisdiction.

It can perhaps more appropriately be compared to the German "Feststellungs-Klage," which is a special form of process enabling parties, in cases of doubt as to their respective present and future rights to secure the declaration of a competent Court in the form of a judgment resolving the existing doubt, and fixing the rights of the parties. The Act probably represents a case of unconscious imitation, and this may serve to explain the restricted scope of the Act and the incomplete character of the proceedings. In the case above cited, Atkin J. observes that, although rights and liabilities could be conclusively declared under the Act, the result appears to be that the British subject would have to wait until peace before he could enforce these rights. Even then, he must apparently bring a second action in order merely to enforce his rights which the Court has authoritatively declared, and which it could not alter. No fault can be found, it is suggested, with the principle underlying such a proceeding, but the machinery provided by the Act can only be characterised as clumsy and inefficient in comparison with the remedies afforded in such cases by the German procedure.

Part II is devoted to a discussion of the leading American and British cases, and the discussion of these has been greatly enlarged and brought up to date. Part III contains the principal proclamations and statutes, while the Appendix deals with the "End of the War" and other matters.

The work has been furnished with an extensive and very carefully-prepared Index, which serves to enhance the value of the whole as a work of reference.

R. K.

THE BELGIAN CONGO.[1]

If we regard the extent of the Congo State (about 900,000 square miles), its possession by Belgium, itself only a small protected State without any record of foreign adventure, and the mode of the acquisition, it may be admitted to be a phenomenon without parallel in the history of colonisation. The creation of the State was seemingly fortuitous, but in fact was due to the application of far-seeing minds to the conditions of the moment. The vast area of the Congo basin had been only partially explored, chiefly by British travellers, when Stanley discovered the great bending course of the river. As first discoverers, the British might have pushed their claims, if at the time our Government had not its hands full elsewhere. No other European country, except Portugal and France, was in the field, and they had only uncertain claims pegged out in the coastal region. It was fortunate for the Congo State, when it was projected, that a narrow strip at the mouth of the river had not been reduced into possession by any Power, and was available for access to the sea. Failing to induce the British Government to assert its claims, Stanley turned to Leopold of Belgium, and the Association was formed out of which grew the Congo State. It was soon found to be a one-man company. The story of its tortuous career from its recognition as a State in 1884 until its conversion into a Belgian colony in 1908, and its more orderly growth since that absorption, is recorded with clearness by Professor Keith in the volume noted below. Leopold was sadly hampered by the restrictions of the Berlin Act, to which his State owed its existence, although his astuteness enabled him in large measure to evade them. He was forbidden by the Berlin Act to grant any monopoly, but this difficulty was surmounted by the assertion of proprietary rights over the greater part of the territory, as *domaine privé* or *domaine de la Couronne*, and by the superfine legal argument that, though the grant of a monopoly was unlawful, the exercise of it was not. Under this cloak of law ivory and rubber became the property of the State, and were collected through the chiefs by oppressive methods. For a time they yielded a handsome revenue, but, neither being the result of cultivation, the sources dried up, and harsher measures in collection failed to produce a continuous flow. The whole administration of Leopold, who deliberately had followed Dutch and German example in preference to British, is an object lesson in misgovernment. It is only just to record that leading Belgian statesmen viewed their King's adventure with alarm and disapproval, and when the administration was attacked by Great Britain, they recognised that the needed reforms could only be effected, and that the Belgian loans could only be secured, by the conversion of the

[1] *The Belgian Congo and the Berlin Act*, by Arthur Barriedale Keith. Pp. 322. (Oxford: Clarendon Press.)

Congo State into a Belgian colony. The bad work of Leopold will take long to undo, but, as Professor Keith shows, the task bids fair to be well accomplished.

The Berlin Act has been a failure; it could hardly have been a success. What is to be done with it in the new African situation created by the Peace? Will attempts be made to adapt it to a larger sphere, or will it be scrapped to give place to a new settlement? The Powers now concerned with Central Africa are Great Britain, France, Belgium, and Portugal, whereof the last three are likely to favour free trade only if not applied to themselves. Whether free trade or protection be applied to a territory is of less consequence. What must be insisted upon is that no differentiation be imposed (as has been done in the Congo State) in favour of nationals. Apart from this, prudence will probably withdraw fiscal methods from the cognisance of the new African Conference, and common ground of action will be sought in the restriction of arms and alcoholic liquor, while otherwise permitting each country to develop its dependency according to its own methods.

ALBERT GRAY.

MR. FREDERIC HARRISON'S LECTURES.[1]

THE veteran author of these lectures remarks in the Preface:

> It will be remembered that the whole of these five lectures were delivered and published just forty years ago, and they are based on the books then current, and reflect the views of that day. But as they are almost entirely historical, it does not seem to me that subsequent authorities have displaced or superseded them.

It was a wise decision to republish them, and still more to republish them in their original form. Any attempt to bring them up to date by revisions would have largely destroyed their value, for they are one of the landmarks of a distinct period in English juristic thought—that of the revolt against the dogmatism of Austin, marked by the concluding chapters of Maine's *Early History of Institutions*, Sir Frederick Pollock's *Essays in Jurisprudence and Ethics*, the article on Jurisprudence in the ninth edition of the *Encyclopædia Britannica*, and these lectures. To say this is no detraction from their value, but merely a reminder to the reader that he is perusing the language of 1879, not that of 1919. They are in many respects the best "comment on Austin" ever written, and it is no surprise to learn that at many Universities

[1] *On Jurisprudence and the Conflict of Laws.* By Frederic Harrison. With annotations by A. H. F. Lefroy. 8vo., pp. 179. (Oxford: at the Clarendon Press, 1919. 10*s.* 6*d.* net.)

students have been advised to search them out in the old files of the *Fortnightly Review*. The reprint includes two lectures on Conflict of Laws as well as the three on Jurisprudence.

The annotations by Professor Lefroy only occupy some thirty pages of the volume. They take the form of a number of quotations from more recent writers, with a comparatively small amount of running commentary by the editor. The selection appears to have been done admirably, and the passages cannot fail to be of the greatest value both to the University student and the ordinary reader. They are valuable both in themselves, and as an indication of the places where the student should search for fuller information. The only serious omission is the failure to indicate the modern revolt against the metaphysical theory of the State. The realism exemplified amongst many others by the works of M. Duguit and the late B. E. Hammond's *Bodies Politic and their Governments* cannot fail to make a deep impression upon juristic studies.

H. J. R.

THE CAPTURE OF PRIVATE PROPERTY AT SEA.

The Immunity of Private Property from Capture at Sea[1] covers a wider field than its title would suggest, and a general survey of maritime law justifies its author, Mr. H. S. Quigley, in maintaining (p. 191) that—

> The proposition of immunity . . . henceforth . . . can hardly be considered except in relation to the various elements—blockade, contraband, continuous voyage, visit and search, war zones—that are capable of being incorporated with the basic element, capture, into "systems" for the "control" of enemy trade.

The writer states shortly the events leading to the Declaration of Paris, and discusses in some detail the conduct of maritime war by European States from 1854 to the close of the Balkan Wars. He finds that, while the rules of the Declaration were observed, belligerents had already devised expedients for curtailing the advantages to neutral commerce which these rules were designed to secure.[2]

A separate chapter is devoted to the practice of the United States. The new republic embodied in its first treaty (a commercial agreement with France), and in many later treaties, the correlative principles: "free ships, free goods: enemy ships, enemy goods." In only one,

[1] *Bulletin of the University of Wisconsin.* 25 cents.

[2] But Mr. Quigley's statement, here and elsewhere in the book, of British practice regarding claims for compensation by neutral owners of cargo lost on destroyed enemy merchantmen, cannot be accepted.

the Jay Treaty of 1794, did it accept the English doctrine. But Jefferson's well-known Note to Genêt is but one of the many pronouncements by American administrative and judicial authorities to the effect that the rules applied in the British Courts were then part of the law of nations, and had to be applied in the absence of agreement to the contrary. In the treaty with Prussia of 1785, the principle of the immunity of non-contraband private enemy property at sea was incorporated; but it disappeared from the treaty of 1799. In 1856 it was proposed by Mr. Marcy, Secretary of State, as an amendment to the Declaration of Paris; it was embodied in a treaty with Italy of 1871, and was put forward by the United States Delegates at The Hague.

Mr. Quigley undertakes, in paragraphs which display a wide range of research, an analysis of the opinions held by publicists throughout the world; and he narrates the public and private proposals which have been made to modify the law of capture, the discussions in England, France, and Germany, after the Declaration of Paris, proceedings of the Institute of International Law and other bodies, the Report of the Royal Commission on the food-supply in 1903, and the deliberations of The Hague Conferences.

In his chapter on the War, Mr. Quigley does not record the conflicts between belligerents and neutrals later than July 1915. After a preliminary reference to the treatment of enemy merchant vessels found by a belligerent in harbour or at sea at the outbreak of war, and to the unsuccessful attempt on the part of the United States Government to secure the adoption of the unratified Declaration of London by both belligerent groups, he enumerates the successive steps in the struggle for mastery of the enemy's trade.

In the first place there came the extension of contraband; longer lists, presumptions as to destination, and the application of the doctrine of continuous transport. Moreover, the practice of search in port, inevitable under modern conditions, called forth early protests from the United States. Soon the German Government, aspiring to annihilate British overseas trade and stop the flow of supplies to the Allies, resorted to indiscriminate destruction of enemy and neutral shipping, and Great Britain and France, in reprisal, prohibited the transport of goods to or from Germany in neutral vessels. This Order was expressed to be a measure of retaliation; but it was also justified by the British Government in a Note of July 23rd, 1915, as "an adaptation of the old principles of blockade to the peculiar circumstances" with which they were confronted.

From a detailed description of these measures Mr. Quigley draws the conclusion that the British system for the control of German trade, and the attempted destruction of all shipping by Germany, have a common origin in the realisation of the vital importance of foreign

trade in modern war. Both expedients, in his opinion, repudiated the right of protection granted by the Declaration of Paris to enemy goods on neutral ships up to the limit of neutral endurance.

These new devices and methods, usually developments of older measures or outgrowths from their basic principles, point toward an increasing determination on the part of belligerents to regard commerce as an object of attack, not only legitimate, but of the first consequence to the enemy. The tendency appears to be toward a view of an enemy nation's commerce as a whole . . . and away from separation into portions differing in ownership, character, and destination. The profit to be derived from considering as a separate question the abolition of capture in the narrow, accepted sense has become extremely doubtful (p. 165).

R. F. R.

THE FEDERAL CONVENTION OF 1787.

UPON Madison's notes[1] in the Debates of the Federal Convention of 1787, Dr. Brown Scott has based an analogy with the development of the League of Nations. His view is that the Federal Convention of 1787 was in fact, as well as in form, an *International Conference*, in which thirteen States, recognised as free, sovereign, and independent by the Mother Country on September 3, 1783, revised their *Union*, and formed their original *Constitution*; that future *International Conferences* may profit by the experience of the *Federal Convention*; and that the "Society of Nations," in forming an International organisation, should master the proceedings of the Federal Convention of 1787, and consider the experience of the United States.

Dr. Scott does not go so far as to show how the division of the Constitution of the United States into Legislative, Executive, and Judiciary powers, with a Supreme Court wielding statutory powers, can be reproduced in a "more perfect Society," that is, a League of Nations. An ominous note by Mr. Madison is quoted, that "the practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." Can any League work without effective sanctions?

C. E. B.

[1] *James Madison's Notes of Debates in the Federal Convention of 1787, and their Relation to a more Perfect Society of Nations.* By James Brown Scott. (New York: Oxford University Press, American Branch; London, etc., 1918.)

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